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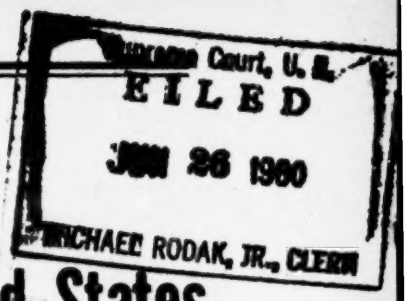

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2045

JEFF H. DUPUIS, BERNIS H. DAVISON
JOHN ZERBE and WILBUR L. SMITH

Petitioners

VERSUS

STATE OF LOUISIANA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

GRISBAUM & KLEPPNER
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3224 North Turnbull Drive
Metairie, Louisiana 70002

ATTORNEYS FOR PETITIONERS

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IN THE SUPREME COURT OF THE
UNITED STATES

TERM 1979

NO.

JEFF H. DUPUIS;
BERNIS H. DAVISON;
JOHN ZERBE*, and
WILBUR L. SMITH

Petitioners

VERSUS

STATE OF LOUISIANA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Louisiana, entered December 13, 1979, rehearing denied January 28, 1980, refusing to overrule a decision of the Trial Court denying Petitioners' Motion to Suppress Evidence.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Louisiana in ***State of Louisiana v. Dupuis, et al*** is reported at 378 S.2d 934 (La., 1979) and is set out in ***Appendix B***, attached hereto.

* a/k/a John R. Perdian

JURISDICTION

The Judgment of the Supreme Court of Louisiana as it pertains to Petitioners was entered on December 13, 1979, and a timely Petition for Rehearing was denied on January 28, 1980. Petitioners sought and obtained from this Honorable Court an Order extending the time to file a Petition for a Writ of Certiorari to and through June 26, 1980. (See *Appendix C*, attached hereto).

Jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3), Petitioners having asserted below and they assert in this Court deprivation of rights secured by the Constitution of the United States of America.

QUESTIONS PRESENTED

1. Whether the lower Courts erred in concluding that persons residing in a rural community whose property included cultivated farm land lack a reasonable expectation that Federal and State Law Enforcement Officers will not, in the nighttime, surreptitiously, trespass upon their land and observe activities in the yard and driveway of their private residence from the cultivated protions of that private property and driveway.

2. Whether the lower Courts erred in their analysis of "curtilage", in their conclusion that the concept of "curtilage" was controlling in a determination of Petitioners' "zone of privacy", and in their conclusion that the observed activities of Petitioners were outside of the "cutilage" surrounding their residence.

3. Whether the lower Courts erred in their finding that the officers comprising the Federal - State Task Force, hidden on private property owned by Petitioners, had probable cause sufficient to justify their warrantless seizure of vehicles also

located on private property and to justify ultimate warrantless search of those vehicles.

4. Whether the lower Courts erred in finding that the warrant requirement of the Constitution of the United States was not violated when law enforcement officers: a) ***seized*** and b) ***searched*** trucks located on private property when there was no indication that the vehicles were immediately to be moved and when law enforcement officers were available and had more than adequate time and facilities to obtain a warrant prior to movement or to stop the vehicles if they were placed in motion before ever reaching public highways.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following Amendments to the Constitution of the United States:

Amendment IV.

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV. Section 1.

> "All persons born or naturalized in the United States. and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any

person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves the following provisions of the Constitution of the State of Louisiana of 1974:

Article 1, Section 2

DUE PROCESS OF LAW

"No person shall be deprived of life, liberty, or property, except by due process of law."

Article 1, Section 5

RIGHT TO PRIVACY

"Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures or invasions of privacy. No Warrants shall issue without probable cause supported by Oath or Affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate Court."

This case also involves the following Federal Rule of Criminal Procedure:

Rule 41

Rule 41. Search and Seizure

(a) Authority to Issue Warrant. - A search warrant authorized

by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government.

(b) Property or Persons Which May Be Seized with a Warrant. - A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

(c) Issuance and Contents.

(1) Warrant Upon Affidavit.- A warrant other then a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place

named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

(2) **Warrant upon oral testimony.**-

(A) General Rule.- If the circumstances make it reasonable to dispense with a written affidavit, a Federal Magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means.

(B) Application.-The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate. The Federal magistrate shall enter, verbatim, what is so read to such magistrate on a document to be known as the original warrant. The Federal magistrate may direct that the warrant be modified.

(C) Issuance.- If the Federal magistrate is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate sahll order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate's name on the duplicate original warrant. The Federal magistrate shall immidiately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

(D) Recording and certification of testimony.- When a caller informs the Federal magistrate that the purpose of the call is to request a warrant, the Federal magistrate shall immediately place under oath each person whose testimony forms a bsis of the application and each person applying for that warrant. If a voice recording device is available, the Federal magistrate shall record by means of such device all of the call after the caller informs the Federal magistrate that the purpose of the call is to request a warrant. Otherwise a stenographic or longhand verbatim record shall be made. If a voice recording device is used or a stenographic record made, the Federal magistrate shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the Federal magistrate shall file a signed copy with the court.

(E) Contents. -The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

(F) Additional rule for execution. -The person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant.

(G) Motion to suppress precluded. -Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.

STATEMENT OF THE CASE

This is a Petition for a Writ of Certiorari to review the Judgment of the Supreme Court of Louisiana, entered December 13, 1979, rehearing denied January 28, 1989, affirming the conviction of Petitioners, JEFF H. DUPUIS, BERNIS H. DAVISON, JOHN ZERBE, and WILBUR L. SMITH.

Petitioners, with others, were charged by Bill of Information with Possession of Marijuana with Intent to Distribute, a violation of Louisiana Revised Statutes 40:966 (a). The charge resulted from a warrantless seizure and search of trucks located on private property owned by Petitioners, JEFF H. DUPUIS and BERNIS H. DAVISON. The seizure and search was carried out by a joint task force consisting of United States Government Agents and Louisiana State Police, which operation was under the primary control of agents of the United States Government.

The Petitioners filed a Motion to Suppress Evidence attacking the seizure and search. An Evidentiary Hearing was commenced on December 12, 1978, and was concluded on December 15, 1978. That Hearing revealed the following:

On June 15, 1978, at approximately 3:00 o'clock, P.M., a joint task force of the United States Customs Air Officers and Louisiana State Police commenced a surveillance of a rural residential compound, including a house and mobile home, which is the home of the families of Petitioners, JEFF H. DUPUIS and BERNIS H. DAVISON. Dupuis lives in the house with his wife and their children and grandfather, and Davison and his wife live in the mobile home near the Dupuis house. This residential compound, including its environs, is bounded on the west by Louisiana State Highway 349; on the north by the Parish Road; and on the east and south by the edge of plowed fields of growing sugar cane. The field to the south is included in the Dupuis property. (Transcript, Pages 500 - 503; 506 - 510; 519; 520; 522; 523; 529; 537; Exhibits S -1, D - 5,

6, 7, 16, 17, 18, 18A). *

The daylight activities of the joint governmental task force were limited to "roving surveillance" from vehicles operating on the two public highways which formed the north and west borders of the Dupuis property. The roving surveillance consis ted of officers driving by the property to briefly observe what, if any, activity was taking place. (Transcript, Pages 343 - 345; 565; 647; 648; 668).

About 7:30 P.M., as darkness fell, United States Customs Air Officer Wade and Louisiana State Trooper LeJeune Proceeded together on foot from the Parish Road which was the north boundary of the Dupuis property through the sugar cane and surreptitiously secreted themselves in the cane field immediately south of the Dupuis residence. The law enforcement officers moved about within the Dupuis property from time to time. (Transcript, Pages 432; 437; 439; 443 - 448; 451; 475; 567; 568; 572; 577; 578; 593; 594; 595; 641; 642).

The outer boundaries of the Dupuis property were clearly defined by a gully on the south, the Parish Road on the north and a fence along Highway 349 on the west side. (Transcript, Pages 439; 443 - 446; 520; 522; 532; 534 - 535; 541 - 542; 577; 578; 593 - 595). Officers testified that at all times their on - foot surveillance activities were conducted from within these boundaries, but they indicated that they were not at all concerned with the possibility of being on private property or on the Dupuis property. While the officers were generally located approximately 25 to 40 yards south of the Dupuis house, at least once, Louisiana State Police Officer LeJeune crept to the edge of the cane, approximately ten (10) yards from the house. (Transcript, Pages 380 - 382; 439; 443 - 446; 446 - 448; 475; 532; 534 - 535; 541 - 542; 567; 568; 572; 577 - 579; 593; 595; 607 - 608; 641 - 642).

During the evening, Officers Wade and LeJeune observed

the Petitioners having a barbeque in the Dupuis' back yard. Meanwhile, three (3) trucks, an 18 wheel trailer and two (2) Bobtail trucks, remained stationary within the Dupuis family residential compound. (Transcript, Pages 451; 482; 567).

At some time betweem 11:15 and 11:30 P.M., Officers Wade and LeJeune observed the barbeque come to an end and the light in the barbeque area go out. Shortly thereafter, a car drove into the driveway. Then, the Officers heard the refrigeration unit on the 18 wheel trailer go off. At that time, through the use of infra-red and star light night viewing equipment, the Officers observed various persons, who could not be identified, approached the truck. Thereafter, the 18 wheel trailer was moved a distance of approximately 3 to 4 feet and parked on the shell driveway. One of the Bobtail trucks was then backed up to the rear of the 18 wheel trailer. Officer Wade testified that at that time, when the rear doors of the 18 wheel trailer were opended to allow the Bobtail truck to be backed flush to the trailer, he saw large bales of an unknown substance inside the trailer which he immediately assumed to be marijuana. He advised his superior, Customs Air Officer Joachim, by radio, that he saw "large bales". Officer Wade begrudgingly admitted that he could not confirm, by any objective standard, his suspicion that the bales contained marijuana. Officer Wade failed to detect the telltale odor of Marijuana, notwithstanding the fact that the refrigeration equipment on the trailer was off, which, if on, would have diminished any such odor. Officer Wade further admitted that he failed to observe inside any of the bales and saw no gleanings of marijuana or other green vegetable matter, even with the use of his sophisticated visual aids. Finally, Officer Wade admitted that he could not discern the wrappings on the bales, but based his suspicions on their shape and size which subsequently he admitted were identical to commercially purchased bales of peat moss. Officer Wade admitted that because of his pre-conceived suspicions, he expected to see marijuana when the bales were

opened. (Transcript, Pages 470 - 484).

Officer LeJeune, the other officer conducting the onsite surveillance, indicated that the bales were not observed until the first Bobtail truck was pulling away from the 18 wheel trailer after having been unloaded. Officer LeJeune also acknowledged that he failed to smell the odor of marijuana, see inside the bales or detect the presence of marijuana gleanings or other green vegetable matter. Officer LeJeune admitted that since he was expecting the substance to be marijuana, he did not pause to consider whether the packages might have contained anything else. Transcript, pages 570; 578; 584; 585; 590).

A United States Customs Air Officer (Joachim) contacted United States Magistrate Herbert for the purpose of obtaining a Telephonic Search Warrant, in accordance with Federal Rules of Criminal Procedure 41 (c) (2). The State conceded, however, that the issues to be presented to the Court at the Hearing on the Motion to Suppress Evidence involved a warrantless search because the "Affidavit" presented to the Magistrate for the purpose of obtaining that Warrant contained undisclosed hearsay and speculation, not revealed to the Magistrate, (Transcript, Pages 349, 350, 351, 352, 353, 357, 358 - 360; 415; 419; 422 - 424; 426 - 428 and further contained out - and - out false statements (Transcript, Pages 347; 361; 362; 382; 478; 488) Additionally, the Magistrate and requesting officers totally failed to comply with the requirements of Rule 41 (c) (2) of the Federal Rules of Criminal Procedure. (Transcript, Pages 195 - 198; 330; 331; 366; 374; and 375). In addition, the United States Magistrate in question admitted during a Hearing on the Motion to Suppress Evidence that the Search Warrant itself was substantially altered several hours after it had been issued and executed upon by expanding the description of the premises to be searched and inserting the words, "the vehicles located" and further by adding a description of property to be searched for with the words, "or other contraband." (trans-

cript, Pages 306 -309).

The Trial Court declined to invalidate the seizure and search and denied Petitioners' Motion to Suppress Evidence. (Transcript, Pages 745 - 764). Thereafter, Petitioners entered pleas of guilty as charged, with reservation of their rights to appeal the Trial Court's denial of their Motion to Suppress Evidence. (Transcript, Pages 766 - 797). As a result of those pleas, the Trial Court sentenced each of the Petitioners to pay fines of FIFTEEN THOUSAND ($15,000.00) DOLLARS, plus Court costs, and in default in payment of said fines, to serve TWO (2) YEARS at hard labor with the Louisiana Department of Corrections and futher that they be sentenced each to serve a term of THREE (3) YEARS at hard labor with the Louisiana Department of Corrections. (Transcript, Page 797).

Petitioners unsuccessfully appealed their conviction and the refusal of the Trial Court to uphold their Motion to Suppress Evidence to the Louisiana Supreme Court.

FEDERAL QUESTIONS RAISED AND DECIDED BELOW

I.

Prior to Trial, Petitioners moved to suppress the evidence seized, and they based that motion upon the Fourth Amendment to the United States Constitution.

II.

As a basis for Petitioners' Motion to Suppress Evidence, they contended that as residents in a rural community with property including cultivated farm land, they had a reasonable expectation that Federal and State Law Enforcement Officers would not, in the nighttime, surreptitiously, trespass upon their property and observe their activities in the yard and driveway of their private residence, from cultivated protions

of their private property and driveway, and they contended that these activities were direct violations of their rights as guaranteed by the Fourth Amendement to the Constitution.

III.

In the Courts below, petitioners contended that the concept of "curtilage" is no longer controlling in a termination of Petitioners' "zone of privacy" as protected by the Fourth Amendment to the United States Constitution and they further contended that, nevertheless, the activities in which Petitioners were engaged and which law enforcement officers observed from Petitioners' private property were conducted from within a Constitutionally protected "zone of privacy".

IV.

In the Courts below, Petitioners contended that the Fourth Amendment to the United States Constitution was violated by law enforcement officers in the conduct of a warrantless seizure and search of trucks located on private property when there was no indication that the vehicles were immidiately to be moved and when law enforcement officers were available and had more than adequate time and facilities to obtain a Warrant prior to the movement or stop the vehicles if they were placed in motion before ever reaching public highways.

V.

In the Courts below, Petitioners contended that Federal and State Law Enforcement Officers lacked the "probable cause" required by the Fourth Amendment to the United States Constitution for the conduct of a seizure and search upon Petitioners' private property.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

1. This Court should grant Certiorari to consider whether persons residing in a rural community, whose property includes cultivated farm land, have a reasonable expectation that Federal and State Law Enforcement Officers will not, in the nighttime, surreptitiously, trespass and observe activity in the yard and driveway of that private residence from cultivated portions of that private property and driveway, and whether such activities on the part of Federal and State Law Enforcement Officers constitute a direct violation of Fourth Amendment Rights.

In ***Rakas v. Illinois***, 439 U.S. 128; 99 S. Ct. 421; 58 L. Ed. 2d 387 (1962), this Honorable Court discussed the "legitimate expectations of privacy" and the manner in which they must be defined. At footnote 12, 99 S. Ct. at 430, Justice Rehnquist, in effect, explained that the notion of private property rights is not dead in an inquiry as to expectations of privacy. At 99 S. Ct. 431, footnote 12, Justice Rehnquist declared:

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, see W. Blakstone, Commentaries, Book II Ch. I and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude. . .
>
> But by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment.

A search conducted without a Warrant, as in the case before this Court, is, ***per se***, unreasonable, under the Fourth Amendment to the United States Constitution, subject only to a few specifically established and well-delineated exceptions. ***Coolidge v. New Hampshire***, 403 U.S. 443, 454 - 455 (1971), 91 S. Ct. 2022; 29 L. Ed. 2d 564. It is fundamental that observations made by law enforcement officers which form the basis of a seizure and search must be made by officers who have a right to be where they are. ***Coolidge v. New Hampshire, Supra. United States v. Johnson***, 541 F.2d 1311, 1316 (8th Cir., 1976); ***United States v. Bradshaw***, 490 F.2d 1097, 1100 (4th Cir., 1974). In ***Katz v. United States***, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), this Court defined unlawful Fourth Amendment intrusion. This Court proclaimed a "zone of privacy" within which a citizen has a reasonable expectation of privacy. If a government agent has intruded into a person's "zone of privacy", such intrusion must have been justified by a "warrant for another object, hot pursuit, a search incident to a lawful arrest, or some other legitimate reason for being present, unconnected with a search directed against the accused." Otherwise, the results of the search ***do not*** fall within any legitimate exception. ***Coolidge***, 403 U.S. at 446.

That an unjustified ***visual*** intrusion into the zone of privacy violates the Fourth Amendment is well settled in the Fifth Circuit. ***Texas v. Gonzales***, 388 F.2d 145 (5th Cir., 1968); ***Brock v. United States***, 223 F.2d 681 (5th Cir., 1955). In ***Rakas, Supra***, this Court has clearly established that concepts of property ownership and control continue to weigh heavily in a determination of the "zone of privacy" described in ***Katz***. See 439 U.S. at 143 and 144, footnote 12. The facts before this Court reveal that the "zone of privacy" which was violated consisted both in the location and circumstances of the trucks and in the location and the circumstances of the officers making observations.

In the case before this Court, Petitioners exhibited a reasonable expectation of privacy by conducting their activities behind their residence, on their private driveway, away from public roads, within closed trucks, and in a manner which permitted no observation except by someone crawling through a sugar cane field (three feet high) owned by one of the Defendants under the cover of darkness. Such "gymnastics" as described by these officers in order to observe the Defendants have been disapproved by the Supreme Court of the State of Louisiana in such cases as ***State v. Lamartiniere***, 362 So. 2d 526 (La., 1978).

The simple and bold fact remains that the officers conducting the surveillance in question had no right to be where they were. The Supreme Court of Louisiana, in the instant case, has recognized that the officers were, in fact, trespassing upon private property owned by Petitioners. ***State v. Dupuis***, 378 So. 2d at 837).

The effect of the ruling of the Louisiana Supreme Court in the instant case would be to give to owners of rural property no expectation of privacy at all, if they happen to grow sugar cane, or some other crop adjacent to the land upon which their actual residence is located. It must be remembered that the observations which were conducted here were absolutely surreptitious in nature, carried out in total blackness, and aided by the use of sophisticated night viewing equipment. ***State v. Dupuis***, 378 So.2d at 937). It is suggested that one has an even greater right to expect privacy and to expect that persons will not be trespassing in his fields at night than he does during the daytime.

In ***United States v. David*** 423 F.2d 974 (5th Cir., 1970), the Court held:

> Many cases involving the 'plain view doctrine' concern evidence recovered from automobiles located in ***public*** places. The rule lends itself to application in these situations because the observing officer is not required to trespass on private property in order to have a clear view of the articles inside the automobile. (Cites omitted). However, where police officers trespass in ***order to secure the view,*** we have not hesitated to find a search.

The foregoing language was cited approvingly in ***United States v. Holmes***, 521 F.2d 859 (5th Cir., 1975), where the Court ruled that "when a law enforcement agent trespasses solely to unearth evidence of a crime, he has no 'right to be in the position to have that view". *Id.* 869. In that case, as in the case here, the agent making the observation "admitted that his sole purpose in getting close enough to peer into the (object of the search) was to look for marijuana."

In the case at bar, surveilling officers were neither in an unprotected area nor in a protected area with prior justification. Whether they were on the Dupuis property (as they admittedly were), or on someone else's property without permission, they acknowledged that they recognized that they were on ***private property*** and that they had no permission to be there. Thus, they had no prior justification to be where they were and their threshold instrusion did not meet any legitimate tests.

The ***Holmes*** case, ***Supra,*** also dealt with another issue squarely on all fours with the case at bar. In that case, the government, while recognizing that an examination of property rights is relevant to the determination of privacy interests, argued, as the Trial Court in the instant case held, that the Defendants had exhibited no reasonable expectation of privacy because

"no fences enclose any part of the property, and no 'no trespassing' signs were posted, and there was not proof of special attempts to conceal the marijuana from any 'passerby'". *Id.* at 869, 870. The Court of Appeals responded as follows:

> The government would have us ignore the character of the (Defendants) property. Whatever precautions a homeowner in an urban area might have to take to protect his activity from the senses of a casual passerby, a dweller in a rural area whose property is surrounded by extremely dense growth, need not anticipate that government agents will be crawling through the underbrush by putting up signs warning the government to keep away. *Id.* at 870.

See also *Brock v. United States*, 223 F.2d 681 (5th Cir., 1955). The decision of the lower Courts in the instant case can lead only to the conclusion that a rural dweller is afforded less Constitutional protections for his zone of privacy than an urban dweller.

The logic of the *Holmes* rationale as given above, was recognized in *Phelan v. Superior Court of Mariposa County*, 151 Cal. Rptr., 599, 603 (Ct. App. 1979) where a California Court emphatically stated, "Nor does the absence of boundary fences or 'no trespass' signs of itself negate Petitioner's objective expectations of privacy." It cannot be said, therefore, that Petitioners did not display a reasonable expectation of privacy which was improperly violated by the instant search.

Moveover, when a "plain view" of evidence is obtained during an unlawful search, the "plain view" doctrine can never be used to justify the seizure of that evidence. *State v. Watkins*, 237 N.W. 2d 14 (S.D. 1975); *Commonwealth v. Myers*, 361

A 2d 884 (Pa. 1976). For law enforcement officers to see contraband from a place where they have a right to be, the initial intrusion must have been lawful and legitimate. ***People v. Walker***, 64 Mich. App. 138, 235 N.W. 2d 85 (1975); ***In Re Brewer***, 24 Ill. App. 3rd 330, 320 N.E. 2d 340 (1974). The following language is pertinent:

> "We believe that where the centry onto premises on the part of a law enforcement officer is illegal ***ab initio***, we cannot apply the plain view doctrine . . . It is well established that an unlawful search upon an illegal entry cannot be justified by what is found in the search, (citation omitted) and it seems reasonable that this rationale should also be applied to the plain view doctrine. In other words, the plain view doctrine was not applicable unless (the officer) was on a part of the premises to which the general public was allowed access. Such was not the case . . . The record revealed that the premises were not public in nature and the State has failed to make a showing that the situation was of such emergency nature as to excuse the procurement of a search warrant. ***People v. Clark Memorial Home***, 114 Ill. App. 2d 249, 252 N.E. 2d 546, 548 (1969).

In a New York case, the Court recited the lack of exigencies to justify a police investigator's surveillance without a warrant. There, as here, the enforcement officer's entry onto the premises was not incident to a lawful arrest. Nor was he engaged in hot pursuit or motivated by the need to prevent loss of evidence:

> But having failed to obtain a warrant where no exigent circumstances were present, the investigator's position

> in the defendant's back yard was unlawful, thereby rendering his "Plain view" constitutionally infirm. ***People v. Abruzzi***, 52 A.D. 2d 499, 385 N.Y.S. 2d 94, 97 (App. Div. 1976).

In ***Abruzzi***, the police investigator, without a warrant, positioned himself in a doctor's back yard where he could observe an undercover policewoman in an examining room or a doctor who was suspected of committing sexual misconduct with female patients. Quite unexpectedly, the investigator observed the doctor with a female patient in another examining room, which led to the doctor's conviction of sexual abuse in the first degree. The ***Abruzzi*** Court concluded that, granted such initial illegality, all the fruits of the search must be suppressed:

> In applying these maxims to the appeal at bar, we hold that the independent act of the defendant in engaging in a course of criminal conduct not anticipated by the trespassing investigator, is out-weighed by the severity of the constitutional violation inherent in the initial abuse of the defendant's reasonable expectation of privacy. (Cf. ***Katz v. United States, Supra.***) This kind of search conducted by the police investigator without a warrant, must be declared to be invalid in all respects. 385 N.Y.S. 2d at 97.

In the case at bar, it cannot be said that the Petitioners did not display reasonable expectation of privacy which was improperly violated by this visual search.

The actions of law enforcement officers cannot be justified on the contention that the Petitioners "knowingly exposed" their trucks to public view. A private residence, within an open field, is similarly "exposed to public view" but the location of that residence does not permit a visual entry ***into***

the residence under any doctrine. Here, the presence of closed vehicles does not justify a similar visual intrusion into the interior of the trucks, a Constitutionally protected area.

It cannot be suggested that Petitioners "knowingly exposed" the contents of the enclosed trucks to "public view". It is clear that only a limited glimpse or view of the interior of these trucks was acquired, and that was accomplished only through the highly secretive and sophisticated efforts of Federal and State Narcotics Officers, hidden on private property with no prior justification. (Transcript, Pages 432; 437; 439; 443 - 448; 451; 475; 567; 568; 572; 577; 578; 593; 594; 595; 641; 642.)

Nor can it be contended that officers might just as well have set up their night time observation of the three trucks from any of the public roads in the vicinity. Such a contention does not in any way justify the establishment of surveillance by those officers from private property without prior justification. Moreover, had the officers conducted their surveillance from public roads, they could not have seen into the interior of the trucks. There was no contention made and, indeed, the record completely negates the idea that the contents of the trucks in question could have been observed from any public road in the vicinity. As a matter of fact, an examination of the photographs and exhibits in the record of this proceeding will clearly indicate that such observations would have been impossible. The fact that the surveilling officers were required to move to within fifteen or twenty ywrds of the trucks in order to confirm their sighting corroborates the conclusion that they were not mere "inadvertent" visual sightings.

The mere ability to observe the presence of closed vehicles in a private driveway from a public road does not justify surrepti-

tious visual intrusion within the inside of those vehicles. It is apparent that the officers in question were not content to continue the "drive-by" of the premises or to conduct periodic overflights of the area. If the sole purpose of the observations by government agents was to determine when and where the vheicles would head, it is apparent that such "drive-bys" and overflights, coupled with the admitted presence of a multitude of police officers securing every road leading from the premises, were more than ample to accomplish that limited purpose. Instead, a special team of Federal and State officers secreted themselves on private property, within a few yards of the residence and the trucks parked on a private driveway, and conducted an intensive visual search of the area and of the interior of the trucks, utilizing sophisticated night viewing equipment, binoculars, etc. A claim that these activities were aimed solely at detecting movement of the vehicles in question is specious and should be summarily rejected.

The mere existence of an object in "plain view" does not, by itself, justify its seizure without a Search Warrant, absent the narrow exceptions established by jurisprudence. That the police officers who conducted the search under attack in the instant case completely ignored that principle is evident in the following statement by Trooper Trahan, in charge of the joint operation for the State of Louisiana, appearing at Page 632 of the Transcript:

> A. Well, when I had that information there, I told Rick -- I said, 'let's hit them.' He said, 'Well, no, let's get a warrant.' I said, 'We don't need a warrant. We got all the probable cause in the world. You got two agents setting in the field; you've got plain view; they saw the bales in the truck; they heard the bales being set on the surveyor. We don't need no search warrant . . '

Nor can the "open field" exception justify this initial warrantless search. This doctrine was first enunciated in ***Hester v. United States***, 265 U.S. 57, 44 S. Ct. 445, 68 L.Ed. 897 (1924) in which revenue officers examined abandoned moonshine jugs on the land of the father of defendant. Recent cases have held ***Hester*** to be inapplicable in light of ***Katz v. United States, Supra*** and instead have resolved the question, not on strict property issues, but instead upon the "reasonable expectation of privacy". Cf. ***Patler v. Slayton,*** 503 F.2d 472, 477 (4th Cir. 1974); ***United States v. Perez,*** 440 F. Supp. 272, 287 (Ohio, 1977); ***United States v. Freie,*** 545 ; F.2d 1217, 1223 (9th Cir. 1976); ***State v. Byers***, 359 So. 2d 84 (La. 1978). As indicated in ***Freie,*** "Hester no longer has any independent meaning but merely indicates that open fields are not areas in which one traditionally might reasonably expect privacy." 545 F.2d at 1223.

These Petitioners had not abandoned marijuana in the middle of an unattended, uncultivated open field. Instead, their activities were being conducted in complete privacy, within enclosures which one could reasonably expect to exclude scrutiny by the average "passer-by". Thus the ***Hester*** exception is totally inapplicable. Even if the pre-***Katz*** notion of "open fields" were applied, that doctrine has never authorized an intrusion into a protected area (in this case, the Petitioners' driveway). Instead, in all of the traditional "open fields" cases, the objects searched were actually in anopen field. Cf. ***United States v. Brown,*** 473 F.2d 952 (5th Cir., 1973) and ***United States v. Hollon***, 420 F.2d 302 (5th Cir., 1970), both cited by the Trial Court in support of its ruling in the instant case.

Here, Petitioners conducted their activities behind their residence so that they could not be observed from the public road and with full and reasonable expectations of privacy. Considering the Petitioners were on a tract of land owned by them and out of view of public roads, there is nothing more that they could have accomplished to maintain the privacy of their activities, under the circumstances.

In ***Olmstead v. United States***, 277 U.S. 438 (1928). the Supreme Court set forth the trespass doctrine as a triggering device for Fourth Amendment protection. Some years later, the Court "began to move away from basing its decisions on the protection of privacy was at the heart of the Fourth Amendment's proscriptions. Miraldi, ***The Relationship Between Trespass and Fourth Amendment Protection After Katz v. United States,*** 38 Ohio St. Law J. 709, 711 (1977). This movement culminated with the *Katz* decision in 1967. The current two-prong test for Fourth Amendment protection was set forth in Justice Harlan's concurring opinion in *Katz*:

> (F) irst . . . a person (must) have exhibited an actual (subjective) expectation of privacy and, second, . . . the expectation (must) be one that society is prepared to recognize as "reasonable". 389 U.S. at 361.

Although some decisions have implied that *Katz* overruled the trespass doctrine, that conclusion is in error, as has been noted by this Honorable Court in Footnote 12, ***Rakas, Supra.*** As the Sixth Circuit declared in ***United States v. Carriger,*** 541 F.2d 545, 550 (6th Cir., 1976):

> "We believe that the Supreme Court's determination that the "trespass" doctrine could "no longer be regarded as controlling" was intended to expand the pro-

> tection afforded by the Fourth Amendment. Certainly, that was the effect in *Katz* where the Court found an illegal search and seizure even though no trespass was committed by FBI agents. Accordingly, we are of the view that *Katz*, considered with the case law before it, should be read as holding that trespassing is one form of intrusion by the government that may violate a person's reasonable expectation of privacy. Although we do not hold today that any evidence gained as a result of a federal agent's trespass constitutes an illegal search and seizure, we believe it is helpful to rely on property concepts "simply because they assist in establishing the perimeters of the Fourth Amendment guarantees as they relate to the home." *Fixel v. Wainwright*, 492 F.2d 480, 483, n. 3 (5th Cir. 1974).

Under this analysis, it is manifestly clear that an illegal search and seizure was committed in the case at bar. Petitioners' reasonable expectation of privacy is clearly violated by the tresspassing of the law enforcement authorities upon the private property of one of the Petitioners. Officers secreted themselves within a few yards of Petitioners' residence and their trucks which were parked on their private driveway. From there, these officers conducted an intensive visual search of the area and of the interior of the trucks, using sophisticated night-viewing equipment.

Nor can this intrusion be excused as a mere "technical trespass" under any of the meanings of that term:

> First, a trespass may be technical if the officer has moved only a short distance from a place in which he has a right to be. Second, a trespass may be techni-

> cal if the defendant fails to take precautions to make the premises private. Third, if the officer could have seen the incriminating evidence equally well from a place where he had a right to make a view, the trespass is technical. 38 Ohio St. Law J. 709, 721 - 722 (1977).

In the instant case, officers had penetrated the Dupuis property and advanced as close to the residential compound as possible; the Petitioners took all possible precautions to keep their activities private, and the view of the incriminating evidence could not have been attained from the private road, which is the only place where the officers had a right to be.

The Fifth Circuit has sustained the validity of the trespass doctrine in ***United States v. Davis***, 423 F.2d 974 (5th Cir., 1970), Cert. Denied, 400 U.S. 836 (1970), a post- ***Katz*** decision. See also ***Fixel v. Wainwright***, 492 F.2d 480 (5th Cir., 1974) where the trespass doctrine was applied to the common fenced - in backyard of a four unit apartment complex. Both decisions stressed the sanctity of the home and the right to be left alone.

The most recent expression of this Court's vigorous protection of the sanctity of the home and private property appears in ***Payton v. New York***, (No. 78-5420) (1980) and ***Riddick v. New York***, (No. 78-5421) (1980) in which it has held that the Fourth Amendment to the United States Constitution prohibits law enforcement officers from making warrantless and nonconsensual entries into a home in order to accomplish an arrest, even where probable cause exists, absent an emergency situation. The language of Justice Stevens, speaking for the majority of the Court, reaffirms this Court's reverence for the sanctity of the home. Petitioners submit that that sanctity extends to all of the private property which a rural

dweller calls his "home", as in the case at bar.

It has been explained in 38 Ohio St. Law J. at 729, that "if, . . . the officer entered the property looking solely for evidence of crime, then the officer's presence constitutes a search within the proscription of the Fourth Amendment." Citing ***United States v. Holmes***, 521 F.2d 859 (5th Cir., 1975). This situation describes the facts of the case at bar. Officers herein secreted themselves on Petitioner Dupuis' property to watch of evidence of crime, a clear violation of the Fourth Amendment ot the United States Constitution.

Petitioners had a reasonable expectation of privacy extending beyond the driveway and into the sugar cane fields. It is patently illogical to conclude that where the plowed fields began, Petitioners' expectation of privacy ended, when they were inside a privately owned truck located on a private driveway, just a few feet from the edge of the privately owned sugar cane field, forming a part of the total residential compound owned by Petitioners. As stated in ***People v. Weisenberger*** 216 P. 2d 1128 (Col. 1973):

> "Even though the area of the search might have been outside the curtilage, nevertheless, if it was a place where the owner had a reasonable expectation of privacy, then it was a constitutionally protected area where warrantless intrusions are forbidden under the federal and state constitutions." 516 P. 2d at 1129.

Accordingly, the Fourth Amendment protection extends to all of defendants' property. In the case at bar, Petitioners also demonstrated a reasonable, justifiable expectation of privacy within the rural Dupuis porperty. They, further, had taken deliberate measures to ensure that their activities were pro-

tected from detection by other persons by positioning the trucks behind the residence, in such manner that no one on the public road could observe the loading and unloading. Because the evidence is the fruit of the unlawful search, it should properly have been suppressed.

To the same effect is ***Phelan v. Superior Court of Mariposa County***, 151 Cal. Rptr. 599 (Ct. App. 1979). There, the Defendants cultivated a marijuana garden in an isolated narrow ravine on foothill property they owned. The garden was protected in part by trees, in part by a chicken wire fence laced with tree branches and shrubs, and by large rocks which made a natural barrier on one side. Sheriff's officers engaged in surveillance of the property and, from a vantage point atop a rocky knob on the side of the hill, spotted the garden. Officers verified their suspicions that the plants were marijuana with the aid of binoculars. Officers continued their surveillance on later dates and the defendants were subsequently arrested for cultivation of marujuana. The warrantless search was held to violate defendants' subjective and objectively reasonable expectation of privacy:

> "However, since petitioners took reasonable steps to enclose their garden from the observation of others, they echibited such a claim of privacy. That the enclosure did not totally conceal the plants does not foreclose a reasonable expectation of privacy; otherwise, any discovery resulting from an officer's exploratory search would be lawful regardless of how flagrant or purposeful the trespass. Only reasonable efforts to secure privacy under all of the circumstances are required.

* * * * *

> As we have explained, the inquiry is not whether the officers have violated a particular boundary line in their searching but whether they have invaded the defendants' reasonable, exhibited expectation of privacy. (Citation omitted). The expectation of privacy defines the parameters of the right to search. (Citation omitted). While the possessor of unfenced rural property should anticipate the presence of occasional trespassers, the lack of boundary fences alone does not foreclose a reasonable expectation of privacy as to a particular area on the land such as the ravine, and enclosed garden in the present case. We perceive no difference between fenced land and open land having a particular enclosed area, insofar as the Fourth Amendment is concerned. 151 Cal. Rptr. at 604, 606."

It is also interesting to note the Court's footnote on Page 606 to the effect that " . . there is no basis for anticipating the presence of police officers engaging in an exploratory search for marijuana." The Court concluded, as Petitioners respectfully contend this Court should conclude:

> "By electing to engage in a surreptitious surveillance from the adjoining owner's property, the officers assumed the risk of intruding into petitioners' constitutionally protected area of privacy. Having done so, the search was illegal, regardless of the officers' good faith." 151 Cal. Rpt. at 606.

See also ***State v. Wert***, 550 S.W. 2d 1, and ***People v. Fly***, 34 Cal. App. 3d 665, 110 Cal. Rptr. 158 (1973).

Similarly, where the sheriff flew a helicopter over the defendant's back yard to search out marijuana plants which

were not visible from the road, defendant's conviction for unlawful cultivation was reversed. The helicopter observation amounted to a search without a warrant and an "unreasonable governmental intrusion into the serenity and privacy of his back yard" which could not be justified under theplain view doctrine. ***People v. Sneed***, 32 Cal. App. 3d 535, 108 Cal. Rptr. 146, 151 (1973). The helicopter was "a seeking out, manifestly in nature", just as was the search here.

Of additional pertinence here is the case of ***Lorenzana v. Superior Court of Los Angeles County***, 9 Cal. App. 3d 626, 108 Cal. Rptr. 585, 511 P.2d 33 (1973). There, the California Supreme Court appears to equate unreasonableness with ***any*** police intrusion into a citizen's right of privacy:

> "We now recognize the constitutional encasement which renders inviolable the individual's reasonable expectation of privacy; any governmental intrusion into that privacy is an "unreasonable search" within the meaning of the Fourth Amendment, whether that intrusion be the traditional physical search (citation omitted) or a surreptitious auditory invasion (citations omitted) or, indeed, visual intrusion." 511 P. 2d at 42.

The need for additional clarification of ***Rakas v. Illinois***, Supra, is apparent from a consideration of decisions from other circuits. In ***United States v. Vicknair***, 610 F.2d 372 (5th Cir., 1980). Judge Rubin, at Page 377, explained that:

> A search need not be clandestine to be unlawful. The police crossed the premises with the admittedly illegal purpose of searching the Sky Top II'. If that is not enough to infect the entire entry, their entry onto the

> enclosed area of the premises and their attempts to observe the interior of the house through closed and shuttered windows belies the assertion that their sole purpose was to locate the owner of the premises . . . the parade of a uniformed officer and marked police cars does not mask the background of invalid purpose.

Judge Rubin also declared, at Page 377, that:

> The police excursion onto the private premises at 9330 Balada, however, was neither entirely innocent nor within the scope of ordinary police routine. The police suspected that the house and the boat were being used for marujuana smuggling. Their visit was to confirm those suspicions.

In *Vicknair*, the government had contended that because a marked police car had been in the area and because a police officer had openly attempted to arouse occupants of the house by knocking and because there was no "clandestine or surreptitious behavior", the technically illegal trespass was of no consequence. In response, Judge Rubin stated, "Such threads of distinction weave too fine a cloth to cover the unconstitutionality of the entry." Judge Rubin also declared,

> A Defendant's attempts to maintain his privacy, ***see United States v. Chadwick***, 1977, 493 U.S. 1, 11, 97 S. Ct. 2476, 2483, 53 L. Ed. 2d 538, 548; ***Katz v. United States***, 1967, 389 U.S. 347, 351, 88 S. Ct. 507, 511, 19 L. Ed. 2d 576, 581, and his use of an area, ***See Jones v. United States***, 1960, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697; ***United States v. Britt***, 5 Cir. 1975, 508 F.2d 1052, 1055, ***Cert Denied*** 423 U. S. 825, 96 S. Ct. 40, 46 L. Ed. 2d 42, are both rele-

vant considerations that may establish the existence of a privacy interest even absent property rights in the area. See ***Rakas v. Illinois,*** 1978, 439 U.S. 128, 150, 99 S. Ct. 421, 435, 58 L. Ed. 387, 405 (Powell, J., concurring).

In ***United States v. Rios***, 611 F.2d 1335 (10th Cir., 1979). the Court analyzed considerations pertinent to determining Fourth Amendment rights. That Court indicated that a showing that a person who owned specific premises "took normal percautions to maintain his privacy - that is, precautions customarily taken by those seeking privacy" would bear upon the Fourth Amendment right to privacy. The Court cited ***Rakas v. Illinois***, 439 U.S. at Page 152. (611 F.2d at 1345).

It is submitted to this Court that it is most appropriate at this time for the highest Court of the land to grant the Writs requested herein in order to fully clarify and delineate the parameters being drawn in ***Rakas.*** In ***Rakas,*** this Court has begun a meaningful journey on the road to practically and fully defining the "privacy interests" protected by the Fourth Amendment to the United States Constitution. In the case at bar, this Court has before it the perfect vehicle to continue that journey toward its ultimate goal.

II. This Court should grant Certiorari to consider whether the analysis of "curtilage", by the lower Courts in their conclusion that the concept of "curtilage" was controlling in a determination of Petitioners' "zone of privacy," and in their conclusion that the observed activities of Petitioners were outside of the "curtilage" surrounding their residence was erroneous and in violation of the rights of privacy guaranteed to Petitioners by the Fourth Amendment to the United States Constitution.

The antiquated "curtilage" distinction is not wholly valid, after this Court's decision in ***Katz, Supra***. The comments of this Court in ***Rakas, Supra***, call for a re-evaluation and clarification of the apparent rejection of "curtilage" which appears in ***Katz***.

The Louisiana Supreme Court, in the case at bar, apparently erroneously relied on the "curtilage" doctrine. ***State v. Dupuis***, 378 So. 2d at 937. The contention that the private shell driveway upon which the trucks were parked was "outside of" Petitioners' "curtilage" is simply without merit. This claim just not supported by the record. A reading of the record will reveal that the trucks were located on a private shell driveday in the midst of a tract of land comprising the Dupuis-Davison residence. That tract of land contained two (2) domiciles. The private shell drive was obviously a part of the two residences and their environs. The testimony presented during the Hearing substantiates that conclusion.

Historically, a person may reasonably expect privacy within his home and the area surrounding it and he may expect to be safe from warrantless intrusion therein. ***United States v. Davis***, 423 F.2d 974 (5th Cir., 1970). He may also expect to be free from visual intrusion into that area. In the case at bar, as the Trial Court correctly held, the trucks which were searched were certainly within the environs of the Dupuis family compound. They were on a private shell driveway used by the Dupuis and Davison families and their guests only. Along the side of that driveway, right at the edge of the cane field where officers lay hidden, was a bicycle, presumably belonging to one of the Petitioners' children. Around and outside the driveway was a carefully mowed area of grass which was maintained by Petitioners and which contrasted sharply to the plowed and planted sugar cane fields. (Transcript, Pages

502, 503, 520, 522, 532, 577 - 579, 593 - 595).

For a recent and pertinent analysis of "curtilage", the Court's attention is invited to ***United States ex rel Saiken v. Bensinger***, 546 F. 2d 1292 (7th Cir. 1976). That Court examined the decisions of several Courts of several jurisdictions in an attempt to establish whether the case law had set forth a standard for determining how far "curtilage" may extend from a person's residence. It was held that prior case law had displayed "a perfect symetry and enunciated a clear rule: any outbuilding or area within seventy-five (75) feet of the house is within the curtilage and any outbuilding or area further than seventy-five (75) feet is outside the curtilage." ***Id.*** at 1296. This conclusion was reached by expressly not considering ***Walker v. United States***, 225 F.2d 447 (5th Cir., 1955) where "curtilage" was held to extend two hundred ten (210) to two hundred forty (240) feet from the house. Even so, applying the "clear rule" defined by ***Saiken***, it is apparent that in the case before this Court, the "curtilage" of the Dupuis-Davison residential complex extended at least to the edge of the cane field, thereby completely engulfing the vehicles which were siezed.

Certiorari should be granted in this matter, therefore, in order to permit this Court to provide a functional treatment of the issues raised by Justice Rehnquist in ***Rakas, Supra.*** The rulings of the Louisiana Supreme Court and the Trial Court in the case at bar, as they stand, operate to provide those who live in rural areas a lesser expectation of privacy with respect to law enforement officers conducting nighttime trespasses than the expectation of persons located in urban areas. Neither historically nor socially can this be justified.

In the instant case, the trucks which were seized by law enforcement officers and in which Petitioners were apprehended

were located entirely on private property immediately adjacent to their residence. They were not on a public highway. They had become, by location and destination, absolutely equivalent to "outbuildings" comprising a portion of the residential compound. The protection of the Fourth Amendment to the United States Constitution must extend to these trucks, therefore, at that location and under those circumstances. The principles expressed by this Court in ***Rakas, Supra,*** demand that.

III. This Court should grant Certiorari to consider whether the lower Courts of Louisiana erred in their finding that officers comprising the Federal-State task force, hidden on private property owned by Petitioners, had probable cause within the meaning of the Fourth Amendment to the United States Constitution, sufficient to justify their seizure of vehicles also located on private property and to justify the ultimate search of those vehicles.

The one factor essential to the legality of any search is the presence of probable cause.

It is clear that when a Search Warrant is based on hearsay, the Affidavit in support thereof must articulate th underlying circumstances upon which the informant bases his conclusion and the circumstances supporting the informant's credibility. See ***Aguilar v. Texas***, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). Likewise, a warrantless search, even if justified under an exception to the warrant requirement, must be based on probable cause and there must be an articulable set of underlying circumstances justifying conclusions from an informant.

In the instant case, the testimony during the Hearing on a

Motion to Suppress Evidence revealed that the "facts" of which Law Enforcement Officers allegedly were aware, consisted primarily of speculation and hearsay conclusions. The fatal defects in the information in the instant case are revealed in the following listing.:

(1) A contention by Officer Joachim that one of the trucks which was under surveillance was registered to Zerbe & Sons was, in fact, hearsay information. (Trasncript, Pages 349 - 350);

(2) Officer Joachim, at the Hearing on the Motion to Suppress Evidence, conceded that his assumption that a relationship existed between Mr. Zerbe (a Petitioner herein) and a Mr. Zylstra (suspected of marijuana smuggling), was, in fact, rank hearsay, many times removed from Joachim. (Transcript, Pages 351 - 352).

(3) Officer Joachim assumed that a relationship existed between Petitioner, Dupuis, and Marvin Zylstra, and his initial suggestion that he had firsthand knowledge of such a relationship was later revealed to be nothing more than rank hearsay and speculation. (Transcript, Page 53).

(4) Officer Joachim speculated (and acted upon that speculation by conducting a seizure and search) that marijuana contraband supposedly aboard the trucks under surveillance was brought in on an aircraft between June 11 and June 15, and it was demonstrated during a Hearing on the Motion to Suppress Evidence that that assumption was pure, rank speculation, and, in fact, was totally false. (Transcript, Pages 358 - 360).

(5) Officer Joachim, who made the ultimate decision to seize and search, speculated that observers in the private cane field saw marijuana, but in truth, and in fact, the objects which they saw were not obviously marijuana, and could have contained any number of legal substances. (Transcript, Pages 363 - 354; 408; 471 - 473; 480).

It has been stated that an even higher standard for determination of the existence of probable cause must be applied to warrantless searches than that which must be applied to searches based on a validly issued Search Warrant. ***United States v. Anderson***, 500 F.2d 1311, 1315 (5th Cir., 1974). In order to determine whether or not probable cause existed, the Court must determine whether under the facts and circumstances known to police at the time of the search in question, a reasonable person would have concluded that a crime had or was taking place or, alternatively, that there was contraband upon the premises. See ***Williams v. United States***, 404 F.2d 493 (5th Cir., 1968).

The officers in the case at bar were searching with a view toward uncovering evidence with which to arrest. Probable cause for warrantless arrests may be based only on those facts in existence at the time of the arrest, not on any facts discovered ***after*** the arrest. ***People v. Walker***, 64 Mich. App. 138, 235 N.W. 2d 85 (1975). The burden of proof in a warrantless search is always on the State. ***State v. Allan***, 113 N.J. Super. 245, 273 A 2d 587 (App. Div. 1970). Where, as in the case at bar, the State fails to prove the validity of the arrest leading to the search for and subsequent seizure of the contraband, the evidence is inadmissible and should be suppressed. ***State v. Hinton***, 305 So. 2d 804 (Fla. 4th D. C. A. 1975); ***T. L. W. v. State***, 315 So. 2d 202 (Fla. 3rd D. C. A. 1975).

In the case at bar, officers commenced their surveillance at approximately 7:30 in the evening. It revealed the presence of trucks, not an uncommon occurrence, and a number of persons enjoying a barbeque. (Transcript, Pages 344, 349, 354, 432, 443 - 446, 451, 462, 463, 511, 521 - 522, 565, 567, 583, 584, 638, 639, 654, 689, 690). It is of importance to note that Officer Joachim admitted the presence of a number of automobiles and trucks at the Dupuis residence as early as 2:30 or 3:00 o'clock, P.M. on June 15 (Transcript, Page 344) and the tractor-trailer truck, a focal point of the surveillance, was regularly at the Dupuis residence for weeks prior to the arrest. (Transcript, Pages 349, 354). In addition, it was conceded by Officers Theriot and Lemaire that it was not at all unusual to see a number of vehicles in the vicinity of Petitioners' residence and driveway, including a boat owned by Petitioner and the trailer which was ultimately searched. (Transcript, Pages 654, 688, 689).

At approximately 11:15 to 11:30 in the evening, the barbeque ended and the lights in the barbeque area were turned off. Shortly thereafter, the trucks noved into position for loading or unloading of cargo. Transcript, Pages 452; 453; 458-460; 462-466). Again, such activity would not reasonably appear to be unlawful.

The Court's attention is invited to a recent decision of the Louisiana Supreme Court in ***State v. Rudolph***, 369 So. 2d 1320 (La., 1979) at Page 1324, in which it quoted from "LaFave 'Street Encounters' and the ***Constitution: Terry, Sibron, Peters and Beyond***,65 Mich. L. Rev. 40, 73-74 (1968) in which appears a discussion of ". . . many cases where grounds for arrest have been found lacking because the conduct of the suspect was equivocal, that is, where the possibility of criminal conduct was no greater that the possibility of innocent be-

havior."

During the span of the observation, for brief periods of time, officers observed bales of an unknown substance. (T. 363; 364; 470 - 473; 480; 570; 576; 586 - 588; 590). When questioned as to what was in the bales, the first officer, Customs Air Officer Wade, acknowledged that the bales were identical in shape, form and size to a bale of commercially purchased peat moss admitted into evidence at the Hearing. (T. 480 - 484). The other officer making the observation admitted that in the briefings prior to the commencement of his surveillance, he was preconditioned to believe that if any substance was being unloaded or loaded, that substance undoubtedly would be marijuana. (T. 575 - 576; 585 - 588; 590). The following exchange, as it appears at Page 590 of the transcript, is especially significant:

> "Q. All right; and the difference between you making a guess in that circumstance and you guessing on the night of June 15th was because you were told by your fellow officers that there would be marijuana involved in those trucks?
>
> A. We were looking for marijuana, yes, sir."

Therefore, in essence, these two officers who were engaged in the often competive enterprise of ferreting out crime, jumped to the arbitrary conclusion that the bales contained marijuana when admittedly there were no objective signs such as marijuana gleanings or the odor of marijuana which would perhaps justify that conclusion. A graphic demonstration of this appears at Page 646 of the Transcript where Trooper Trahan, in charge of the Louisiana State Police segment of the investigation,

admitted that the "phony" bale containing peat moss, prepared by Petitioners for the Hearing looked like marijuana, and his only reason for concluding that it did not contain marujuana was that he would not expect marujuana to be lying in the hallway of the courthouse. A reasonably prudent and objective. man, even possessing knowledge that marijuana had been placed in bales of similar size and shape on occasion before, could just as reasonably have concluded that a legal substance was present.

In *State v. Porter*, 324 N.E. 2d 857 (Ct. App. Ind. 1975). the lessor of rural property, while in an adjoining field, observed what he thought was the processing ("stripping") of marijuana. He informed the police who, with the use of binoculars, observed the premises from some 200 yards away. The police obtained a warrant which, as in the case at bar, was subsequently stipulated to be invalid. The Court noted first that the police observations did not fall within the "plain view" doctrine as contended by the State. The essential question, according to the Court, was "whether entry under authority of an invalid warrant can later be justified by reliance on related but distinct theories of law or evidence." 324 N.E. 2d at 859. In affirming the Motion to Suppress Evidence granted below, the *Porter* court stated:

> Further, it is evident that notwithstanding what the officers observed, they entered the premises under authority of a search warrant, for the announced purpose of seizing that which they already knew existed. The purpose for entering was not to arrest, at least not initially.
>
> 'It is a general rule of law that an unlawful arrest cannot be the foundation of a lawful search, nor will the information obtained by an unlawful search

alone, furnish the basis is for a lawful arrest. Where the arrest or search is unlawful to begin with, it is not made lawful by that which afterwards takes place.' (Citations Omitted).

The arrests in this case were made on the basis of an unlawful search and seizure, and that fact cannot be altered by reliance on what the police could have done, or by reliance on how police conducted themselves before or after the impoper entry and seizure. 342 N.E. 2d at 859.

IV. This Court should grant Certiorari to consider whether the lower Court's finding that the warrant requirement of the Constitution of the United States was no violated when law enforcement officers (a) ***seized*** and (b) ***searched*** trucks located on private property when there was no indication that the vehicles were immediately to be moved and when law enforcement officers were available and had more than adequate time and facilities to obtain a warrant prior to movement or to stop the vehicles if they were placed in motion before ever reaching public highways.

A search and seizure carried out without a warrant is ***per se*** unreasonable, unless Law Enforcement Officers can demonstrate that it falls within one of the carefully defined set of exceptions, one of which is the presence of "exigent circumstances", ***Coolidge v. New Hampshire***, 403 U.S. 443, 474 through 475; 91 S. Ct. 2022 29 L. Ed. 564 (1971) Exigent circumstances exist only where, under the facts of the case, it is impracticable to obtain a Search Warrant.

In what appears to be an after-thought, the Louisiana Supreme

Court, at the conclusion of its opinion in this matter, added a paragraph concluding that exigent circumstances existed. ***State v. Dupuis***, 378 So. 2d at 938. The record belies that conclusion.

Initially, it must be remembered that the trucks in question, located as they were on private property, were under direct surveillance by officers for almost five (5) hours before they were seized. Whatever information officers had which was, in fact, speculation, existed for that entire time with the exception of activity in the vicinity of the trucks which allegedly commenced around 11:30 P.M., almost one hour before the ultimate siezure. (Transcript, Page 759). The availability of the United States Magistrate for the purpose of seeking a telephonic Search Warrant under Federal Rules of Criminal Procedure 41(c) (2) is evident throughout the record and from the fact that officers did contact that Magistrate and attempt to obtain a warrant. That attempt was a disaster not only because of the failure of both the Magistrate and officers seeking the warrant to comply with the prerequisites of the Rule but also because of the total lack of a demonstration of adequate probable cause for the issuance of the warrant.(Transcript, Pages 195 - 198, 306 - 309, 330, 331, 332, 340, 347, 349, 351, 352, 353, 357, 358 - 360, 361, 366, 374, 375, 382, 414, 415, 419, 422 - 424, 426 - 428, 470 - 484, 488, 570, 578, 584, 585, 590).

The record reflects that after communcation from Officer Wade, hidden in Petitioners' cane field, to the effect that he had observed bales within one of the trailers, two officers in charge of the entire operations agreed that an apportunity existed to apply for a Search Warrant, but that if the trucks began to move before the warrant was obtained, they would "hit them". (Transcript, Page 633). Thus, there was available to the officers in question, the procedure suggested by this

Court in *Coolidge, Supra*, and by the Louisiana Supreme Court in *State v. Parker*, 355 So. 2d 900 (La., 1978), namely, securing the premises to avoid flight while applying for a Search Warrant.

The principle which must be re-affirmed in this matter and which was apparently ignored by Federal and State Police Officers in the case at bar, is that clearly recognized by Justice Jackson, writing for this Court in *Johnson v. United States*, 333 U.S. 10, 13 - 14, 68 S. T. 367, 92 L. Ed. 436 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Protection consists in requiring that those inferences be drawn by a neutral and detached Magistrate, instead of being judged by the officer engaged in the often competitive enterprise of ferrying out crime. Any assumption that evidence sufficient to support a Magistrate's disinterested determination to issue a Search Warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Exigent circumstances sufficient to justify a warrantless search do not exist merely because the objects to be searched are vehicles. The Louisiana Supreme Court in *Parker, Supra*, recognized that automobiles are not automatically excluded from the Fourth Amendment protection. In *Coolidge, Supra*,

this Honorable Court has noted that "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." In making this observation, this Court recognized that a good number of containers, that is, "trucks, suitcases, boxes, brief cases and bags" are as movable as a vehicle. Therefore, more than the fact that a vehicle is in involved is required to establish exigent circumstances. *Id.* at 461.

The "automobile exception", first recognized by this Court in *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925), was clearly explained by this Court in *Chambers v. Maroney*, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d. 419 (1969). In *Chambers*, this Court found that the stopping of an automobile on a *public* highway constitutes sufficiently exigent circumstances because the opportunity to search was fleeting, the occupants were alerted and the car's contents might never be found again if a warrant were required. This reasoning has been clearly tempered, however, in such cases as *United States v. Chadwick*, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d. 538 (1976) and *Coolidge v. New Hampshire*, *Supra*. In *Coolidge*, it was determined that even, assuming the presence of probable cause, with respect to a vehicle located on private property, a warrantless search or seizure was unconstitutional:

> The police had ample opportunity to obtain a valid warrant in advance; they knew the automobile's exact description and location well in advance; they intended to seize it when they came upon Coolidge's property · · · the seizure was therefore unconstitutional and so was the subsequent search at the station house. 403 U.S. at 473 (Part C).

No United States Supreme Court case has permitted the search or seizure of a vehicle on *private* property (absent factually exigent circumstances) even when probable cause exists. See *Cooper v. State of California*, 386 U.S. 58 87 S. Ct 788, 17 L. Ed. 2d. 730 (1967); *Chambers v. Maroney, Supra.* In *Arkansas v. Sanders*, 99 S. Ct. 2586, at Note 14, this Court again emphasized that the seizure of a vehicle under the automobile "exception" has always involved a seizure on a public highway, as opposed to private property. The rationale in *Arkansas*, involves the impracticality of requiring officers to take a seized vehicle from a public highway and place it in a safe location while obtaining a warrant. Obviously, in the case at bar, the vehicles in questions were not on any public highway, were in a safe location, and could have been detained in that location until a warrant was sought.

In the case at bar, it is evident that the Petitioners were alerted to the surveillance. The opportunity to search was not fleeting. The trucks were not on any public highway. The keys were not in the ignition at the time of the search and it was evident to observers of the vehicles that no one was even in the cab of any of the vehicles. Finally, at the time of the search, the premises had been sufficiently secured so as to prevent any movement off the premises by the vehicles and thereby prevent flight. Therefore, the *Carroll* doctrine is clearly inapplicable. (Transcript, Pages 438, 440 - 443, 591 - 592, 633, 639 - 640, 686 - 687).

A clear description of the factual situation appears at Pages 686 and 687 of the Transcript in the following sequence:

Q. Did you find any keys?

A. No, sir, I didn't.

Q. Were the lights on?

A. Inside the cab, yes, sir.

Q. Inside the cab?

A. Inside the cab. Yes, sir.

Q. But not the headlights on the trucks?

A. I don't know if there were any headlights on the truck.

Q. None at all? You mean the trucks could not run at night?

A. There were headlights on it, but they weren't lit.

Q. Thank you. Were the engines running?

A. No, sir, they weren't.

Q. Was there any appearance at all that those trucks were going to move out?

A. Not at that time, no, sir.

The most recent cases under the *Carroll* doctrine have recognized that the doctrine is applicable to the search of moving vehicles, not vehicles which are parked on private property. See *United States v. Ragsdale*, 470 F.2d 24 (5th Cir. 1972); *United States v. Chapman*, 474 F.2d 300 (5th Cir. 1973); *United States v. Alexander*, 559 F.2d 1339 (5th Cir. 1977). In fact, the doctrine is now popularly referred to as the "warrantless search of a *moving* automobile". (Emphasis Added). *United States v. Anderson*, 500 F.2d 1311 (5th Cir. 1974);

United States v. Nieto, 510 F.2d 1118 (5th Cir. 1975).

No other facts demonstrate the existence of exigent circumstances. The exceptions to the warrant requirement are "jealously and carefully drawn": Jones v. United States. 357 U.S. 493, 499 (1958) 78 S. Ct. 1253, 2 L. Ed. 1514. There must be a showing by those who seek exemption that the exigency of the situation made that course imperative. ***McDonald v. United States***, 335 U.S. 451, 456 (1948). 69 S. Ct. 191, 93 L. Ed 153. Thus, the burden is on those seeking exemption to show the need for it. ***United States v. Jeffers***, 342 U.S. 48 51 72 L. Ct. 93, 96 L. Ed. 59 (1951). In essence, the officers were required to demonstrate to the Court that they literally faced a "now or never situation" whereby, unless they acted to preserve evidence of the crime, that opportunity would be lost in their effort to obtain a search warrant. ***ROADEN V. KENTUCKY***, 413 U.S. 496, 595, 93 S.Ct. 2716, 37 L.Ed. 2d 757 (1973). The "now or never" situation simply did not exist. Where a warrantless search is not conducted under true exigent conditions, the Fourth Amendment has been violated and the fruits of the search should be excluded. ***STATE V. MANKEL***, 27 Ariz. App. 436, 555 P.2d 1124 (1976); ***LUDLOW V. STATE***, 314 N.E. 2d 750 (Ind. 1974).

The lack of exigent circumstances in the instant case is conclusively shown by the de facto attempt to obtain a Search Warrant which failed, not because of the presence of exigent circumstances or lack of time, but because of the legally unsound information relied upon by the Magistrate and the failure of both the Magistrate and Law Enforcement Officers to comply with the safeguards required by Federal Rules for the protection of those whose property Law Enforcement Officers seek to search. See *UNITED STATES V. HART*, 162 F.2d 74 (10th Cir., 1974). Clearly, the issuance of an invalid Search Warrant prior to a search and seizure on the one hand, and a

finding of exigent circumstances, on the other, are mutually exclusive and cannot be reconciled.

Even if there had existed exigent circumstances in the case at bar allowing the ***seizure*** of the trucks in question (and petitioners strenuously contend that no exigent circumstances did, in fact, exist), there certainly were no exigent circumstances allowing the additional warrantless ***searches*** of those trucks. Such a search of these seized trucks on private property, without a warrant, is similar to the search of foot lockers, brief cases, etc., condemned by this Court in previous decisions. Here, the trucks could easily have been seized as they sat dormant on private property, while application for a legal warrant was made. It is apparent that the mere fact that the objects in question are connected with a vehicle does not permit a warrantless search, without exigent circumstances. This Court has confirmed in *COOLIDGE, Supra,* that a vehicle on private property is not, ***per se,*** subject to a warrantless search. In *G.M. LEASING CORPORATION V. UNITED STATES,* 429 U.S. 338, 354, 97 S.Ct. 619, 50 L.Ed. 2d 530, this Court recently acknowledged:

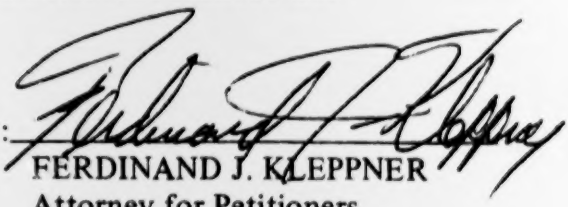
> It is one thing to seize without a warrant property resting in an open area or seizable by levee without an intrusion into privacy, and it is quite another thing to effect a warrantless seizure of property . . . ***situated on private premises to which access is not otherwise available*** for the seizing officer. Cited with approval in *PAYTON V. NEW YORK,* No. 78-5420 (1980) (Emphasis Added).

CONCLUSION

Petitioners have presented to this Honorable Court a situation requiring the action of this Court for purpose of clarification of previous rulings involving basic and fundamental United States Constitutional Rights. The confusion which exists nationally is apparent by an examination of the opinion of the Louisiana Supreme Court in conjunction with the reasoning of this Court in ***RAKAS V. ILLINOIS, Supra.*** Additionally, there exists nationally the urgent need for clarification by this Court of what has been labeled the "automobile exception". Petitioners pray that their Petition for Writ of Certiorari be granted, therefore, in order to review the Judgments and Opinions of the Supreme Court of Louisiana so that the Courts of this land may have available clear and understandable guidelines and principles for the protection of the citizens of this Nation.

Respectfully submitted,

GRISBAUM & KLEPPNER

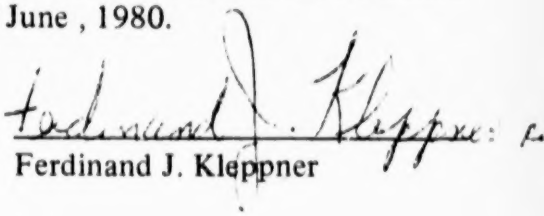
By: 

FERDINAND J. KLEPPNER
Attorney for Petitioners

*(Transcript, Pages 500 - 503; 506 - 510; 519; 520; 522; 523; 529; 537) (Exhibits S - 1, D - 5, 6, 7, 16, 17, 18, 18A) presently in the custody of the Clerk of Court for St. Martin Parish which will not be released without an order of the Court.)

CERTIFICATE OF SERVICE

I, Ferdinand J. Kleppner, an attorney for Petitioner do hereby certify that I have served copies of this Brief to all interested parties. on this the 26 day of June , 1980.



Ferdinand J. Kleppner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2045

JEFF H. DUPUIS, BERNIS H. DAVISON
JOHN ZERBE and WILBUR L. SMITH

Petitioners

VERSUS

STATE OF LOUISIANA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

GRISBAUM & KLEPPNER
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Professional Building
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Metairie, Louisiana 70002

ATTORNEYS FOR PETITIONERS

[306] [307]

evidence the original copy of the search warrant. I have it marked for identification as "D-1".

BY MR. MCHUGH: No objection.

A Could you substitute a copy of it? This is a record that . . . .

BY THE COURT: Yes, we'll order that a copy be substituted, as it may be required for other purposes or other proceedings, too.

Q Judge Hebert, as you look at the original copy of the search warrant, you can see there are two different shades of ink; is that correct?

A Yes.

Q Does this reflect additions or deletions from the original version as it was originally written?

A Well, I don't know what you mean by "original" . . . .

Q All right. As you wrote it the first time, did you add anything to it subsequently to the time that you originally wrote it and signed it?

A Well, I made — later on in that — if you want to know if I made a different . . . . .

Q Were there alterations made?

A Yes; but to reflect the intent of the warrant, I did [307] add certain words to make it clearer.

[307] [308]

Q When did you do this?

A In my office on June 16th in the morning. I began — I wrote out — the majority of the warrant was written out earlier that morning, 12:09 a.m. when I issued the warrant. I wrote out most of it at that time; and when I got into the office that morning, I thought it should be a little bit clearer to reflect the intent of the warrant, so I added a few words that are in lighter ink. The lighter words in ink were added. You want me to say what I added to the warrant?

Q Were any changes made after the arrest?

A I . . . .

Q Okay. The arrest was made shortly after you authorized the telephonic search warrant.

A I don't have anything on an arrest . . . .

BY THE COURT: Why don't you suggest a time?

Q That's what I'm going to — so the arrest was made at approximately 12:25 a.m. on June 16th. You testified that you made additions to the original in your office on June 16th; is that correct?

A Well, I don't know if you'd call them additions. I made — I wrote in the words that I thought made the warrant clearer as to what was being — what I had authorized the night before. I felt that it wasn't complete as I had authorized him orally, [308] and I added the words to reflect that.

Q What were these words, Judge Hebert?

A As far as the — I had changed where it says, "The person of," blank — there was a blank space and I put, "The vehicles located," since we weren't dealing with any search of any purposes -- or any specific premises like — I was aware that I wasn't authorizing a search of a house, but rather the vehicles; so I thought it would be clearer if I put in "vehicles" . . . .

Q When had you first written the warrant?

A That evening — I mean, the early morning, 12:09.

Q 12:09?

A (Witness indicates yes.)

Q And as you originally wrote the warrant, the warrant read or was in authorization to search persons at Route 1, Box 674; an arrest was made pursuant to this warrant; and the following morning, you changed it to read "the vehicles located" at the certain address; is that correct?

A I didn't change it.

Q Or you added the words "the vehicles located".

A To make it clear as to what I had authorized. When I reflected on what I had authorized him to do, I realized when I looked at the form that I wasn't authorizing a search of a certain house, but rather the vehicles located at that location; so I inserted those words, "The vehicles located on the premises." The words, "The vehicles located," was added as well as the description of the

[309] property that they were seeking they alleged to be concealed. He had said "marijuana" and I got the impression that it was "and other contraband", so I thought it would be made clearer . . . . .

Q Are warrants to be given a narrow construction at the time they are issued, or just the warrant once it is authorized is a license to go in and search persons, places and things?

A Well, generally when you have a search warrant -- when the search warrant is presented to you, it's specific as far as the persons or places or as specific as they can be. Sometimes they don't know — they don't know the name of the person or — they're supposed to describe it as best they can and as far as what's being concealed or what they want to search for.

I don't think I changed the intent of the warrant. I had — this is the authorization I gave him, and that morning I just wanted . . . .

Q I'd like to read to you from Rule 41, which authorizes the telephonic search warrants, language contained within Section "C" (2) (B).

BY THE COURT: Repeat that.

Q Rule 41, "C" (2) (B) under the heading of "Application"; and the little "C" is under the heading of "Issuance and Contents". The (2) is under the heading of "Warrant Upon Oral Testimony". It reads as follows: "The federal magistrate shall

* * *

[330] BY MR. VIDRINE: I think I've established this before, but just to make certain, specifically . . .

Q Judge Hebert, who made the transcription? Was it your office, or was it the office of Mr. Joachim with the United States Customs?

A It was the United States Customs office.

Q And these are the people who requested the search warrant?

A Yes.

BY MR. VIDRINE: I tender the witness.

BY MR. ANDREW HALL:

Q Judge Hebert, you listened to that tape along with us, didn't you?

A Yes.

Q You followed it in the transcription, didn't you?

A Yes, I did.

Q Now, the transcription is not accurate, is it?

A No, it isn't.

[330] [331]

Q Yet on June 21, 1978, pursuant to the United States Rule of Criminal Procedure you filed in the official records of the United States District Court a certificate attesting to the fact that the transcript was true and correct and accurate; [331] is that right?

A Yes.

Q But it wasn't, was it?

A No, I relied on my secretary to review the transcript with the tape.

Q You didn't do it, yourself?

A No.

Q You're familiar with Rule 41, aren't you?

A Yes.

Q It doesn't say to rely on your secretary or anybody else; it's your duty to certify it; isn't it? True?

A Yes. I have a lot of duties that I delegate to my employees.

Q But this is a judicial duty?

A (No response.)

Q Magistrate Hebert, you certainly don't have your secretary try your cases for you, do you?

BY MR. McHUGH: Objection, Your Honor.

[331] [332]

BY THE COURT: That's very argumentative and has no probative value.

Q Now, it is true that federal courts including the magistrate's role are courts of limited jurisdiction; is that not correct?

A Yes.

Q And when we deal in areas of criminal law and criminal [332] procedure, you are involved in violation of federal law, not state law; correct?

A Yes.

Q And in order to be a violation of federal law, there has to be an interstate of foreign aspect involved; true? In this particular type of offense.

A I'm not sure.

Q You're not sure. But in connection with taking statements from a United States law enforcement official for purposes of issuing a search warrant, you are doing it in order to determine whether or not there's been a violation of federal law; correct?

A I think . . . .

BY MR. TUCKER: Your Honor, I'm forced to object. I feel that the attorney is simply harrassing the magistrate. The law is very clear, and I'm sure that the Court can read it, can interpret it, and does not have to have an

[332] [340]

interpretation of the law or what the magistrate thinks the law is. I think the Court can take judicial cognizance of it, and it has at hand sufficient documentary evidence of which the Court

* * *

[340] BY THE COURT: Are there any other questions of the defendants?

(All counsel indicate no questions.)

BY MR. McHUGH: No questions.

(Witness excused.)

BY MR. ALLEN HALL: Your Honor, we respectfully submit to the Court that since there are some obvious alterations in the original warrant, it would be proper for that to be maintained in the records of this case with notation being made to the federal court.

BY MR. KLEPPNER: I would have to join in that, Your Honor.

BY MR. HALL: We all join in.

BY THE COURT: I think Judge Hebert brought out the portions that he says

[340]

were inserted later on that morning; but if he didn't, we can at this time for clarification purposes have him give us in quote and unquote the

* * *

[343]

[343] A Customs patrol officer.

Q And where were you stationed?

A Mobile, Alabama.

Q Did you spend your entire career with Customs at Mobile, Alabama with the exception of your move here?

A No, sir.

Q How long were you at Mobile?

A One year and nine months.

Q Where were you prior to that?

A Presidio, Texas.

Q You were also a customs officer at Presidio?

A I was customs inspector at Presidio.

Q And how long were you there?

A I was in Presidio for a total of six years.

[343] [344]

Q Does that complete the total time that you've been with Customs?

A Yes.

Q Now, Mr. Joachim, did you participate in surveillance activities and the ultimate obtaining of a telephonic warrant for a search on or about June 15th or June 16th, 1978?

A I did obtain a telephone search warrant.

Q When did your surveillance activities begin?

A On — at approximately 2:30 or 3:00 on the afternoon of the 15th.

Q What did they consist of at that time?

A For my part, a drive by the residence.

Q How many times did you drive by the residence, and what residence was that?

[344] A I drove by the residence twice, and that was the residence at Route 1, Box 674.

Q Is that in — where is that located?

A I believe it's in Henderson.

Q Is that in St. Martin Parish?

A Yes, sir, I believe it is.

Q Did you conduct any further surveillance after the two drive-by's that you described?

A No, sir, I did not, personally.

Q And during the drive-by's, did you note anything unusual?

A I don't really understand what you mean.

Q Well, did you see — were there automobiles there?

A Yes, sir.

Q Were there people there?

A I didn't see any people, no, sir.

Q Were there trucks there?

A There were trucks.

Q Were there children there? Well, you didn't see any people at all.

A No, sir.

Q Now, when, if ever, to your own knowledge, did a continuous, shall we say, eyeball-type surveillance begin on the residence you described?

A At approximately 3:00 in the afternoon.

Q Who from Customs was there conducting that surveillance?

A No one.

[344] [345]

Q Was anyone from the State Police there conducting a surveillance?

A Yes, sir.

[345] Q Was this surveillance in progress a joint effort of Customs and the State Police — Louisiana State Police?

A Yes, sir, it was.

Q Were you in overall charge of it?

A I was in charge of the activities of the Customs employees involved. I had requested the assistance of the State Police.

Q Now, after you made your two drive-by's, did you leave the general vicinity of the premises under surveillance?

A Yes, I did.

Q Without going into any activities that have no bearing on this particular case, where did you go and what did you do?

A I went to the Region Two Narcotics Headquarters of the Louisiana State Police in Lafayette.

Q And did you at the Region Two Headquarters continue coordination of the surveillance activities?

A Yes, sir, I did.

Q Did you remain there all evening?

[345] [347]

A No, sir, I did not.

Q Where did you go from there, and when?

A At approximately 10:00 p.m., Sgt. Paul Trahan and myself went to the -- to a residence in the near vicinity of the suspect residence.

Q Was that the residence of State Trooper Hebert?

A Yes, sir, it was.

Q And where is that residence located?

A It is south of the suspect residence on Highway 349.

* * *

[347] Q Who was that?

A Larry Lejeune of the Louisiana State Police.

Q Now, were they reporting to you their movements and observations during that period?

A They were reporting their observations to me, yes, sir.

Q When did you move from that particular location?

A The Hebert residence?

Q Yes.

A After having secured the telephonic search warrant.

Q You were out front in the yard of the Hebert residence. Did you go into the house to make the phone call?

A Yes, sir, I did.

Q Now, what was the first call that you made with the goal of obtaining a search warrant?

A What was the first . . . .

Q To whom, and what time?

A To U.S. Magistrate Byron Hebert at his residence.

Q You made no other calls to any other state or federal judge or magistrate prior to the one to Judge Hebert?

A No, sir, I did not.

Q Did you make any calls to any United States attorney prior to calling Judge Hebert?

A No, sir, I did not.

Q Did you tell him what the purpose of your call was?

A I requested — yes, sir, I did.

Q You did; and you told him you were seeking a search warrant; is that right?

A Yes, sir.

Q And did you then begin to tell him any facts that you

* * *

[349] Q When you drove by. Okay. You also state that this truck is registered to Zerbe & Sons, 113 Claymore Drive, Lafayette, Louisiana. When did you learn of that?

A The registration on the trailer had been seen at times previous to the night in question.

Q By you?

A No, sir.

Q Oh, this is not your own personal knowledge; is that right?

A I beg your pardon?

Q This statement that the truck was registered to Zerbe & Sons was not of your own personal knowledge, but instead was something someone else told you; is that right?

A Yes, the State of Louisiana Motor Vehicle Registration.

Q Well, apparently Judge Hebert didn't ask you about that; is that right — about where you got that information?

A No, he didn't.

Q And you didn't tell him where you got it, did you?

A No, sir, I did not.

Q Who specifically gave you that information? What individual?

[349] [350]

A I did not ascertain — I did not get the registration check. Someone else got the registration check.

Q Well, then let me reconstruct this. Is it correct that you got that information from someone else who got it from someone else — namely, at the Motor Vehicle Registration Department? Is that how it [350] came about?

A Yes, sir, that's correct.

Q So you don't know the source at the Motor Vehicle Registration Department, do you?

A Could I explain something about how that's done?

Q Yes.

A Almost all of this information contained concerning registrations is now computerized, and our computer at our central communications network — we call it Sector — which is located in New Orleans, has direct data links to states who are computerized; and all our operator has to do at our request is to enter a number . . . . .

Q Okay, but did you call an operator and request the information?

A No, sir, I did not.

Q Who was your first source of this information?

A A Customs patrol officer.

Q What's his name?

A Gary Thompson.

Q Did you tell that to Judge Hebert?

A No, sir, I did not.

Q Where did Gary Thompson get his information?

A I thought I just explained that.

Q I want to make sure the Court completely . . . .

A He requested from our communications people by radio to provide him with a registration of the . . . .

Q Is that what you're assuming, or did you see and hear him do that?

A No, I didn't see him or hear him do that, no, sir.

[351] Q Now, you state further on in that paragraph that Mr. Zerbe – spelled Z-e-r-b-y – is an associate of Marvin Zylstra. How did you know that? First of all — let me retract the question. Is that true?

A Yes, sir, that's true.

Q How do you know that?

A From intelligence sources.

Q Well, you didn't know that of your own personal knowledge, did you?

A No, sir.

[351] [352]

Q You had never revealed to Judge Hebert that that was something outside of your own personal knowledge, either, had you?

A I'm sorry?

Q You did not tell Judge Hebert when you called him on the phone that this statement you were making was not your own personal knowledge, but something someone else told you; did you?

A No, sir, I did not.

Q Now, who told you that?

A It was an intelligence source.

Q Well, who?

A The — it's rather a what more than a who.

Q A what?

A Rather a what more than who.

Q What is that source, then?

A In this particular case, it's a weekly brief published by EPIC – El Paso Intelligence Center.

Q Who publishes that?

[352] A EPIC – El Paso Intelligence Center – is an inter-agency-intelligence-network-sharing facility located in El Paso, Texas.

Q What agency does it belong to? Customs or the State Police or the Texas Law Enforcement? What is it?

A The agency is under the Justice Department.

Q United States Government?

A Yes, sir.

Q Now, which warm body – individual – if you know, gave that information to EPIC that, quote, Mr. Zerbe is an associate of Marvin Zylstra?

A I don't know which warm body did it.

Q He could have been, as a matter of fact, three or four or five or six times removed from you, couldn't he, to your knowledge?

A Well, I know where the information that Mr. Zerbe was an associate of Mr. Zylstra came from.

Q It came from EPIC; is that right?

A Yes, but I knew — EPIC told me the source of their information.

Q What was that?

A The attorney general's — I'm trying to remember how it was phrased. It was the attorney general's law enforcement arm of the Columbian government.

Q You don't know who this is, do you?

[352] [353]

A No, I don't know the attorney general of Columbia, no, sir.

Q Now, is Route 1, Box 674 the residence of Jeffery Dupuis?

A Yes, sir, to my knowledge, it is.

[353] Q Well, is Route 1, Box 674 where you were speaking to Judge Hebert from?

A No, sir.

Q Okay, we'll come back to that. Now, you state that Jefferey Dupuis is an associate of Marvin Zylstra is that correct?

A Yes, sir.

Q Is that something that you heard Mr. Dupuis or Mr. Zylstra tell you or someonw else within your hearing?

A No, sir.

Q Well, did someone else tell you that?

A Yes, sir.

Q Who was that that told you that?

A The people at the Avis Rent-A-Car dealership.

Q Who were these people?

A I don't know their names.

[353] [354]

Q Well, are you telling us that the Avis Rent — somebody at Avis Rent-A-Car saw some names? Is that it? What is it? Who did it come from?

A Mr. Dupuis rented a car for Mr. Zylstra.

Q But this is something some Avis people told you; is that right?

A Yes.

Q But you don't know which Avis people, their names or anything?

A No, sir.

Q And you didn't report to Judge Hebert that this was something someone else told you whose names you didn't know; did you?

A No, sir.

Q Now, you state further that this vehicle — there are approximately three or four vehicles or more mentioned in this affidavit -- are in this transcription. Which vehicle were you taling about here?

A The vehicle that I was talking about was the trailer portion of the tractor-trailer combination.

Q You didn't explain that to Judge Hebert, did you?

A It says this vehicle was at the residence approximately seven weeks – the trailer only.

Q Now, did you watch that vehicle, whatever one you were talking about there, at the residence for seven weeks?

A No, sir, I did not.

Q So that wasn't your knowledge, either, was it?

A No, sir.

Q That came from someone else?

A Yes, sir.

Q Who was that someone else?

A Gary Thompson.

Q Did you tell Judge Hebert that?

A No, sir, I didn't.

Q So Judge Hebert didn't know that that was information coming from some other party; is that right?

A No, sir.

Q He didn't ask, and you didn't tell him?

A That is correct.

Q Now, you have further in this transcription a statement, "On Sunday, June 11th, 1978." We presume

* * *

[356] Q Did you get that, also, from Mrs. Hebert?

A Yes, sir.

Q But you didn't tell Judge Hebert that?

A No, sir.

Q For the record so that there's no confusion, is it correct that Mrs. Hebert and Officer Hebert are in no way related to Judge Hebert?

A I couldn't tell you for sure. As far as I know, they're not related.

Q In any event, they weren't functioning as agents for him at any time along the way?

A As far as I know, they were not.

Q Now, you didn't then see these vehicles – the bobtail trucks you mentioned – did you? Is that right?

A Yes, sir.

Q When they allegedly returned on June 15th.

A They didn't return.

Q Well, I have a statement here in this transcription that says the truck left the residence and returned to the residence with two other Dodge trucks. Did you see that happen?

A The truck left the residence and returned to the residence the morning of June 15th with two other Dodge three-and-a-half-ton trucks.

Q Did you see those two other trucks come into the residence?

A No, I did not.

Q Then that was from some other source, also?

A Yes.

Q Who was that source?

[357] A Mrs. Hebert.

Q And you didn't tell that to Judge Hebert, did you?

A No, sir.

Q Now, further on in Paragraph Four you state that at 11:15 p.m. on June 15, 1978, air officers et cetera made certain observations. Who are these air officers? We're looking now still at Page One, Paragraph Four.

A The air officer was Henry Wade.

Q You didn't tell Judge Hebert that, though, did you?

A No, sir.

Q And who was the Louisiana State Police narcotics officer?

A Larry Lejeune.

Q And did you tell that to Judge Hebert?

A No, sir.

Q Now, when you said, "We believe to be marijuana," you hadn't seen these bales, had you?

A No, sir.

Q So you had no direct eyeball information to base that statement on, did you?

A Direct eyeball information?

Q Did you see these objects, yourself?

A No, sir.

Q Now, you make a statement that the bales were being offloaded from the large truck. Was that the eighteen-wheeler?

A Yes, sir.

Q Onto two smaller trucks with Georgia plates. Were they the two bobtail trucks?

[358] A Yes, skr.

Q Did you personally see that?

A No, sir.

Q And, as a matter of fact, that's an incorrect statement; isn't it?

A Yes, it is.

Q In fact, the loading was being conducted the other way, wasn't it?

A Yes, it was.

[358] [359]

Q So that was a false statement; at least, it was an error?

A It was an error. That sounds better.

Q Now, going to Paragraph Five, Officer Joachim, the next page, you stated that "this truck had received". Were you speaking there of the eighteen-wheeler?

A Yes, I was.

Q ANd you state that this truck had received some time between June 11th et cetera marijauana contraband brought in on N 888 et cetera. Is that a true statement?

A I don't know whether it's true or not.

Q At the time you gave it, you didn't know whether it was true, either; did you?

A No, it was an assumption on my part.

Q It was a strict assumption Was it speculation?

BY THE COURT: Excuse me, what statement was that?

[359] BY MR. KLEPPNER: Paragraph Five, Your Honor, at the top of Page Two.

BY THE COURT: Specifically, what's the statement?

BY MR. KLEPPNER: "This truck had received some time between June 11 and June 15th, this year, the marijuana

contraband brought in on N 888 RH presumably from Columbia or South AMerica."

Q Was that a false statement?

A That was an assumption.

Q Was it a wrong assumption?

A I don't know.

Q Did that happen or not, sir?

A I don't know, Mr. Kleppner.

Q At the time you gave it, did you know whether it had happened?

A I thought it had, yes.

Q Why?

A Because the November 888 Romeo Hotel belongs to Marvin Zylstra.

Q But that was the only basis you had for making that speculative statement?

A And Mr. Dupuis is an associate of Mr. Zylstra's.

[360] Q And that's all you . . . .

A And that on one other occasion Mr. Dupuis had met this aircraft when it landed at the New Iberia Airport.

Q But, Mr. Joachim, you did not tell Judge Hebert that this statement had no basis in solid fact to your knowledge, did you?

A No, I did not.

Q Now, Officer Joachim, further on in Paragraph Five where the statement appears, quote, "One truck is now full and will be leaving shortly," were you referring to one of the bobtail trucks?

A Yes, I am.

Q As a matter of fact, that statement was in error, wasn't it?

A Yes, it was.

Q That was an inaccurate statement; is that correct?

A Yes, because the transfer of the substance was from the small trucks to the large truck.

Q And, as a matter of fact, you didn't personally observe that, did you?

A No, sir.

Q But you didn't word it to Judge Hebert to indicate that it was coming from someone else, did you?

A I stated earlier on in Paragraph Four that air officers and Louisiana State Police narcotics officers had. . . .

Q Well, aren't you an air officer?

[360] [361]

A Yes, I am.

Q Well, then that could have very well meant you, [361] couldn't it?

BY MR. McHUGH: Your Honor, I'm going to object to that question. That leads to a conclusion and beyond the scope. . . . .

BY THE COURT: He's called on to speculate what it meant to the magistrate.

BY MR. KLEPPNER: I'll withdraw the question, Your Honor.

Q Officer Joachim, we note further that about half-way down Page Two a statement, "Is there a U.S. attorney available?" Your answer, quote, "No U.S. attorney is available, and no time is available to contract a U.S. attorney." Now, as a matter of fact, Mr. Joachim, had you made any attempt to contact a U.S. attorney?

A No, sir.

Q So, as a matter of fact, you did not know that there was no U.S. attorney available, did you?

A When I said that there was no U.S. attorney available, I meant that there was no U.S. attorney immediately available where we were.

Q Do you know any U.S. attorneys?

A Yes, sir.

[362] Q In this area?

A Now, when I say I know them, I have talked to them on the telephone.

Q You know that there are U.S. attorneys that live and reside and work in Lafayette, St. Martinville, Henderson, Breaux Bridge area generally? New Iberia? Is that correct?

A No. To my knowledge, there is no U.S. attorney in Lafayette.

Q How about in the general area of Lafayette, Breaux Bridge, Henderson, Opelousas and New Iberia?

A To my knowledge, there are no U.S. attorneys.

Q Which U.S. attorneys have you contacted in the area by phone? You indicated you had.

A The one is Shreveport.

Q The one in Shreveport; and you knew there was a U.S. attorney in Shreveport, didn't you?

A Yes, sir.

Q But you didn't attempt to contact that U.S. attorney, did you?

A No, sir.

Q So the statement that there was none available had not been verified by any attempt on your part to contact one, had it? Had it?

A No, sir, I hadn't attempted to contact him.

Q Thank you. Now, you didn't have apparently a copy or a duplicate copy of a telephonic search warrant form, did you?

A No, sir. I hadn't planned to get a search warrant.

Q Now, moving to Page Three of the transcription, you [363] state at the top of that, "I am at Route 1, Box 674, Breaux Bridge, Louisiana." That was an error, wasn't it?

A Yes, it was.

Q You weren't there, were you?

A No, sir. I don't know the address of Mr. Hebert's house. I was on the phone and I turned to Paul Trahan and asked him what the address was, and he obviously misunderstood me. I meant the address where we were.

Q Now, proceeding further down this last page of the transcript, you make a statement about the, quote, method of packaging, unquote. You didn't personally observe any method of packaging, did you?

A No, sir.

Q Now, you state further that you had arrested or et cetera, seized marijuana baled up in burlap or paper sacks et cetera. You had not seen these sacks to be in burlap – the ones that were allegedly under observation – had you?

A No, sir.

[363] [364]

Q And you weren't told by anybody that they were in burlap, either; were you?

A I believe Mr. Wade told me they were in bales.

Q But he didn't tell you it was in burlap, did he?

A I don't recall.

Q And Mr. Wade or no one else told you these were seventy-to-ninety-pound bales, either, did he?

A No, sir, not specifically. He just said they were large bales.

[364] Q Just large bales.

A Because he and I have had similar experiences. I conjured up in my mind what it looked like that he was describing to me, based on my experience.

Q But he did not tell you that they were burlap or that they were seventy-to-ninety-pounds weight, did he?

A No, sir, I don't know how he could tell they were seventy to ninety pounds from where he was.

Q Now, after you had conducted this telephone conversation with Judge Hebert, where did you go?

A We drove to the — to a parking area behind the Hungry Hobo Restaurant.

Q What time did you arrive at the Hungry Hobo?

A Let's see. Probably about 12:15.

Q 12:15? Now, referring again to the telephone transcription, I note the very last line of the last page indicates the time is 12:09. How did you determine that time?

A I looked at my watch.

Q The same watch you looked at in the beginning?

A Yes, sir.

Q All right; and you arrived at the Hungry Hobo at 12:15 in the morning?

A That's an approximate — I wasn't keeping track of it.

Q You didn't check your watch when you arrived?

A No, sir.

Q Who met you there?

A Other State Police officers from Region Two Narcotics.

Q Can you tell us who they were, please?

[365] A His.

Q Did you go directly to the residence that had been under surveillance?

A After we missed the driveway, we turned around and came back. Pretty much directly to it.

Q What time did you arrive there, do you recall?

A At approximately 12:25.

Q 12:25?

A Yes, sir.

Q And when you got there, had all the other arresting officers and participating officers and Customs agents already arrived?

A I'm afraid so.

Q You were the last two to arrive?

A I'm afraid so.

Q Now, following that . . . .

A It's a little embarrasing. I mean, I was running this thing, you know.

Q We recall a conversation we had previously. Officer Joachim, following your arrival on the scene at the residence, I assume you conducted your search or assisted in the conduct of a search and made arrests; is that correct?

A No, sir. All the arrests had already been made.

Q Everything had already been done when you got there. And how long did you stay there on the scene?

A Until we began to move the vehicles and the arrestees back to Lafayette.

Q Were you there during a picture-taking session?

A Yes.

[374] Region Two did observe large bales of the substance et cetera. Now, the truth is it was just one air officer and one State patrol . . . .

A True.

Q And you knew that at the time you said it?

A Yes, sir. This was an error of excitement.

BY MR. CHESTNEY: No further questions on behalf of these defendants, Your Honor.

BY MR. ANDREW HALL:

Q Sir, when you went in to sign this document, the exact time the warrant was executed – 12:25 a.m. C.D.T. — that's Central Daylight Time? June 16th, 1978. That's your writing, is it not?

A Yes, sir.

Q Now, there's a little number "5" next to that question, isn't there?

A Yes, sir, there is.

Q Now, that Number Five puts down the person who is supposed to fill in that form, doesn't it?

A That is correct.

Q Okay. And would you tell the Judge what Number Five requires?

A It says, "To be completed by agent when he executes warrant in accordance with 41 (c) (2) (F).

Q All right, let me show you that. Here's a copy of [375] the rule, that section of it. Let's read that.

A "Additional rule for execution. The person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant."

Q Now, you didn't execute this warrant, did you?

A This warrant?

Q That warrant. You were the last man on the scene.

A No, sir, I didn't have the paper in my hand.

Q Yet you went ahead and filled it in; correct?

A Yes, I did.

Q And notwithstanding the instruction that you were not the person who was supposed to fill it in, according to both the fule and the form; correct?

A That's correct, because I didn't have this — that's the first time I've ever executed a telephonic search warrant.

BY THE COURT: Mr. Hall, read me "Five" in the rule again, please.

BY MR. HALL: I'll be glad to hand it up to Your Honor.

[375] [380]

BY THE COURT: All right. Let me see the warrant, please, Mr. Joachim.

A (Witness complies.)

Q At the end of the conversation that you had with Magistrate Hebert, didn't you tell him that,

* * *

[380] surveillance; is that correct? And the other one was constant visual contact? Two aspects of the surveillance. That's true, isn't it?

A I don't know that we had ride-by, because — I don't know that we had that. I couldn't swear that we had that for sure.

Q You don't know. All right, but you certainly laid out a program to have constant visual surveillance: correct?

A Yes.

Q And wasn't that to be after dark in order to avoid detection?

A The surveillance began at approximately 3:00 in the afternoon.

Q Where were the people at 3:00 in the afternoon?

A I don't have any idea.

Q You don't know. Well, later on in the day, a Customs officer working under your direction appeared and commenced to participate in the surveillance. didn't he?

[380] [381]

A Who specifically are you referring to?

Q Well, in your affidavit you say "air officers", but you only meant one – Henry Wade – correct?

A Yes, that's correct.

Q And Henry Wade worked under your direction, did he not?

A Yes, he did.

Q Now, who directed Mr. Wade as to where he would go in order to conduct his surveillance?

A He was self-directed in that he was allowed to pick the most advantageous place for him.

[381] Q Anyplace he wanted?

A Any place that he felt would be most advantageous to him.

Q And that didn't matter whether or not that included going into the property of the defendant, Mr. Dupuis, did it? Did you restrict him from that?

A No, I didn't restrict him.

Q Did you consider at all the possibility that he was actually on one of the defendants' own private property, invading his right to privacy when he commenced his visual surveillance?

BY MR. BURKE: Your Honor, I object. He's testified he didn't know where the man was.

[381] [382]

BY THE COURT: Well, he can ask him about what directions he gave him; and insofar as it pertains to that, it would be a proper question; but that is correct – he said he didn't know where he was.

Q Did you come to learn where he was?

A I didn't know his exact location until the arrests were effected.

Q You mean, when he was telling you what he observed, you made no inquiry as to whether or not he had [382] the ability to observe, that he was close enough?

A That man's got eight years of experience. If he was telling me what he saw, I believed. He's my partner. I have to believe him. I have to trust him. If I don't, I'm in a lot of trouble.

Q I see; so even if he makes a mistake, you've got to trust him; correct?

A We all make mistakes.

Q Well, did you come to learn of the fact that he was making a surveillance — at any time up until the day you've taken the stand today, have you come to learn that where he positioned himself was actually on Mr. Dupuis' property?

A I don't know whose property it was that he was on.

Q You don't know?

A No, sir, I don't.

[382] [402]

Q So the one fact that is certain is that nobody from your agency made any effort to determine who was the owner of the property or get consent to go on the property; correct?

A That's correct.

Q In your affidavit, would you show me anywhere within this document that you say is an affidavit, I guess, where you told the magistrate the ability of these agents to make the observations, where they were physically located?

A What I said was that the reason I was seeking the search warrant -- telephonic search warrant was that the offloading was taking place this very minute.

* * *

[408] I'd rather he not interrupt the witness.

Q Can you answer the question?

A Would you repeat the question, please?

Q This information you have in the first paragraph – the method of packing, the size, the shape. You see that information?

A Yes, sir.

Q Where did that come from? Now, look at the second sentence, also, before you answer.

[408] [414]

A The experience came from my personal knowledge of arrests that I've made and marijuana that I've seized.

Q All right, and the second sentence.

A These bales — would you like me to read it?

Q No, I want you to — where did you get that information?

A From the people on the scene.

Q All right. What information did they give you concerning these bales?

A That they were large bales.

Q What else did they give you?

A That they were distinct, that they were — I don't recall whether or not Officer Wade told me the exact measurement. I asked him whether they were large or small, and he said they were large bales.

Q What other information you had conerning these bales?

BY MR. KLEPPNER: Your Honor, I'm going

* * *

[414] A And you wanted to know how many people I had...

Q How many arrests . . . .

A Incidents or . . . .

Q Incidents, if you wish.

[414] [415]

A Four incidents. Five. I'm sorry.

Q You've had only five incidents throughout your career in which you made arrests or participated in arrests for marijuana?

A Yes, sir.

Q Thank you.

(Discussion off the record.)

(Witness exclused.)

VERNON RAY JOHN, JR., HAVING BEEN CALLED AT THE INSTANCE OF THE DEFENSE, AND HAVING BEEN DULY SWORN ACCORDING TO LAW, DID SAY:

DIRECT EXAMINATION

BY MR. ALLEN HALL:

Q GIve the COurt your name and address, please.

A Vernon Ray John, Jr.; 34 Central Street, Basseterre, St. Kitts.

Q And would you tell the Court, please, your employment?

A I'm meteorologist and assistant air traffic control.

Q What are your duties in the course of your employment?

[415] A Presently in charge of the meteorological staff at Golden Rock Airport and presently doing an air-traffic control assistant program.

Q In that capacity do you control the aircraft coming and going from that airport?

A All aircraft movements.

Q In the course of your official duties, have you ever noticed a certain DC-4 aircraft, No. N – for November – 888 RH – or Romeo Hotel?

A Affirmative.

Q Say it again, please?

A That is affirmative.

Q In what manner did you notice that aircraft?

A The aircraft came and landed.

Q At your airfield?

A That's right.

Q During the month of June, was that aircraft on your field at any time?

A It was.

Q When?

A The 2nd of June, 1978 until the 25th of June, 1978.

Q It arrived on June 2 and . . . .

A Departed on June 25.

[415] [419]

Q Was it there continuously?

A Always.

Q How can you state so?

A Any official movement off that airport, the aircraft must notify the control tower estination and whatever movement that aircraft would like to move, whether taxiing from its present parking

* * *

[419] BY MR. KLEPPNER:

Q Now, Mr. John, as a matter of fact, the aircraft bearing the number given to you by Mr. Hall -- was it under maintenance at the time it was on this field?

A It was.

Q Did you know that of your own personal knowledge?

A Yes, I do.

Q What kind of maintenance?

A I can't give you the nature of the maintenance program that that was -- the mechanic did to the aircraft.

Q Did you see it being worked on?

A Yes, I did.

Q How long a period of time was it being worked on?

[419] [422]

A I'd say probably a period of two weeks, approximately.

Q How long after it arrived at your airport did the maintenance begin on that aircraft?

A Probably a week.

Q About a week? And when did it end?

A To my knowledge, I think the aircraft left and the maintenance guy was still there at St. Kitts, so the maintenance must have been carried out, finished his maintenance, and the aircraft left, leaving the mechanic at St. Kitts.

Q I see.

BY MR. KLEPPNER: I have no further questions, Your Honor.

* * *

[422] have parked on the ramp and on the apron?

A The most at any one time?

Q Yes.

A I'd say about six or seven.

Q Now, you say your tower closes at the last flight in — the last scheduled flight?

A That's right.

Q What is to prevent someonw from flying the aircraft off that airfield after the tower closes?

A There's no prevention. Only that they violate the local regulations.

Q There's no prevention; correct?

A We can't stop them.

Q So it's possible then that this aircraft could have taken off at night and landed and you wouldn't know about it?

A I think we would know.

Q You think you would know. "We" would know?

A I would know.

Q How would you know? You wouldn't be there; right?

A The fire services maintain a twenty-four-hour vigil at the airport.

Q The who?

A Airport fire services.

Q That's the airport fire-prevention – the fire truck and – that's what you're taling about?

A Right.

Q But that's not you; right?

A No, but they notify me first thing in the morning.

Q That's what they're instructed to do?

[423] A That's right.

Q But you don't know if they do that for a fact, do you?

A It's not in my place to say so.

Q So, actually, Mr. John, the only time you have surveillance by the air-traffic controller on that airfield is from the first scheduled flight of the day until the last scheduled flight; is that correct?

A My surveillance, yes.

Q Okay. Thank you.

REDIRECT EXAMINATION

BY MR. ALLEN HALL:

Q You testified that you would know if the aircraft took off at night and returned. Let me ask you this, sir. How far is it from your island to the closest part in the United States?

A About sixteen-hundred miles.

Q How far is it from your island to Columbia, South America?

A I reckon, almost the same thing.

[423] [424]

Q And if an airplane — do you know the approximate speed of a DC-4 from your aviation knowledge?

A 200 knots.

Q Two-hundred knots; so if an airplane flew in a triangle from your island to Columbia to the United States — to the closest point in the United [424] States and back to your island, what would the approximate total distance be?

A Quite a bit.

Q Could that be done in one night?

A No.

BY MR. ALLEN HALL: No further questions.

RECROSS EXAMINATION

BY MR. McHUGH:

Q Did you personally inspect each aircraft that was parked on the apron of every day . . . .

BY MR. KLEPPNER: Your Honor, I'm going to object. I don't think there's any right of recross, except for very rare and limited circumstances when directed by the Court.

[424] [426]

BY MR. ANDREW HALL: Even if there were, only as he directs his cross to questions brought out on redirect; and his question was only a question of mileage and airspeed

* * *

[426] direct.

BY THE COURT: I would think that's well-founded, yes, sir. I'll sustain it.

BY MR. McHUGH: No further questions.

(Witness excused.)

ARLINGTON GUMBS, HAVING BEEN CALLED AT THE INSTANCE OF THE DEFENSE, AND HAVING BEEN DULY SWORN ACCORDING TO LAW, DID SAY:

DIRECT EXAMINATION

BY MR. ALLEN HALL:

Q Mr. Gumbs, would you please state your name and address?

A My name is Arlington Fitzgerald Gumbs. I live at St. Johns Village, Basseterre, St. Kitts. That's in the West Indies.

Q Mr. Gumbs, would you tell us what is your employment?

[426] [427]

A I'm a Customs officer working with the government of St. Kitts.

Q In the course of your employment, are you ever stationed at the airport at St. Kitts? I believe It's known as the Golden Rock Airport.

[427] A Yes, sir. I was stationed there between the 26th of May and the 15th of July.

Q I see; and are you in charge of those of the Customs at the airport?

A While I was stationed there, I was in charge of all the Customs and excise.

Q All right. In the course of your official duties, did you learn of an aircraft known as a DC-4 aircraft known as N 888 RH?

A Yes, sir.

Q Tell me when was the first time you saw that aircraft?

A I first saw the aircraft on the 2nd of June.

Q At approximately what hour?

A It came in some minutes after 3:00.

Q And how long did the aircraft stay?

A It stayed there until the 25th of June, sir.

Q At what time did it leave?

A It left approximately 11:35.

Q During the course of that span of time between June 2 and June 25, did the aircraft ever depart your airport?

A No, sir.

Q Were the chocks ever moved?

A No, not to my knowledge, sir.

Q How far do you live from the airport?

A If you track it in the street, I live about half a mile.

Q And if those engines were ever revved up, would you hear it?

A Yes, sir.

[428] Q Pretty well all over the island?

A Up to where I'm living and a bit further, yes, you would.

Q And is there surveillance of that aircraft at all times?

A Yes, sir, there is always some kind of security on the airport.

Q Your testimony is that airplane has been there continuously from June 2 through June 25?

A Yes, sir.

[428] [432]

Q Was any maintenance performed on that aircraft during that period of time?

A Yes, sir, it was done by an engineer by the name of Kahn.

Q And was it your information that aircraft was airworthy while it was at your field? Or not?

BY MR. McHUGH: I object to this hearsay, Your Honor.

BY THE COURT: What was the question?

BY MR. ALLEN HALL: I said, "Was it your information or of your own knowledge was the aircraft airworthy while it was at your field?"

BY MR. McHUGH: Your Honor, he hasn't been qualified as an

* * *

[432] A That's right, I was in New Orleans.

Q Did you remain in New Orleans all day?

A I remained there until about 4:00 in the afternoon.

Q After that time, where did you go?

A I was told by my supervisor to go to Lafayette to assist in a marijuana surveillance.

Q Did you do this?

A Yes, I did.

Q You left New Orleans at approximately what time, do you recall, sir?

A I'd say around 4:00.

Q How did you — did you drive or did you fly?

A I drove.

Q Approximately how long did it take you?

A I'd say about three hours.

Q So this would have given you an arrival time of about 7:00 p.m.?

A That's right.

Q When you arrived in Lafayette, where did you go?

A I went to the State Police Barracks.

Q Where is this located, sir?

A Lafayette.

Q Upon arriving at the State Police Barracks, what did you do then?

A I was briefed on what we were going to as to surveillance, and I was told that we were going to keep some trucks

[432] [437]

surveillance until they went and picked up — if they went to pick up a load of marijuana; and we set up a game plan as to where we were going to be in position for that

* * *

[437] supervisor called you and assigned you to this case; is that correct?

A That's right.

Q What's the name of your supervisor?

A Schoellmann.

Q Sholarman (question as to spelling)?

A Right.

Q And what is his first name?

A Gary.

Q Mr. Schoellmann assigned you to participate in a marijuana surveillance; correct?

A Correct.

Q What did he tell you at the time?

A That there were some trucks that they believed were going to go pick up a load of marijuana and that they wanted to put under surveillance.

[437] [438]

Q Did he tell you that he belived trucks were going to pick up a load of marijuana, or did he tell you as stated in Paragraph Five of Agent Joachim's affidavit that a truck already on the premises was believed to had already picked up marijuana? Which did he tell you?

A I believe he told me to go and . . . .

Q Pardon?

A Let me finish. To go and assist in surveillance of the trucks that were going to pick up a load of marijuana.

Q So you believed there would be marijuana there that night?

A No, I didn't.

[438] Q You didn't?

A You mean, did I believe there was marijuana in the trucks?

Q No, sir, that's not what I said. I said, you believed that there was going to be marijuana there sometime that night?

A That night or the next day.

Q And that's why you were going — just to wait until you saw the marijuana — correct?

A Incorrect.

Q Well, why were you there?

A To follow the trucks to where they went to see if they picked up a load of marijuana.

Q Then you were actually going to follow the trucks?

A Absolutely.

Q So I take it that when you came over to Lafayette, you met with whom?

A State Police.

Q Well, who?

A Okay. Trooper Lamaire, Lejeune, Sgt. Trahan and Officer Joachim and two other Customs people.

Q Who are the two other Customs people?

A You want their names?

Q Yes.

A Okay. Gary Thompson and James Eubanks.

Q Now, Richard Joachim wasn't there at the time?

A He was there.

Q Okay, so there would be three other Customs people.

A That's right.

Q Now, as far as you were concerned, who was in charge?

[439] A Well, I'd say Joachim was in charge with Customs and Sgt. Trahan for State Police.

Q Now, you didn't go on to the scene of the surveillance without being briefed more particularly, did you?

A I don't . . . .

Q You don't recall whether you were briefed?

A As far as what?

Q Well, were you told where you were going?

A I was told where I was going.

Q Were you told what it looked like — what the property looked like?

A Well, we drove by it.

Q You drove by it. Were the property lines pointed out to you?

A Property lines pointed out?

Q Certainly you're not going to go on somebody's property without their consent, would you?

A We went on the property across the street from the residence.

Q I see. Now, did anybody that was participating in this carefully say, "Don't go on Mr. Dupuis' property"?

A No, sir.

[439] [440]

Q Were you told it was Mr. Dupuis' property?

A No, sir.

Q Did you care?

A Yes, sir.

Q Did you ask?

A No, sir.

Q You must not have cared that much.

BY MR. BURKE: Objection. Now he's arguing with the witness, Your Honor.

BY THE COURT: Objection sustained.

Q Now, was there a surveillance plane before you actually started surveillance?

A There was one there.

Q There was one what?

A An airplane there.

Q An airplane there? Going over the property?

A I don't know about that.

Q Where was the airplane, and what was it doing?

A SItting at Lafayette Airport, as far as I know.

Q For what purpose?

A Surveillance.

Q Of this particular property?

A No, sir, of the trucks when they were in motion.

Q When the trucks were in the motion. Okay. So that as far as everybody was concerned, if the trucks left the property, there would be no problem in following them; is that correct?

A Well, that's incorrect. There's always a problem following somebody.

Q That's why the airplane was there?

A Correct.

Q Okay. Now, you planned, if necessary, to use an airplane in surveillance. What about the rest of the surveillance? Was there any organized pro- [341] gram of who would participate, where they would be, and what they would do?

A I'd say there was.

Q There was? What was it?

A They were set at certain points on the roads to observe the trucks as they went by.

Q Who is "they"?

A State Police, Customs.

Q State Police and Customs were set all along the roadway to observe these trucks as they went by?

A Right.

Q And what time were these roadway observations set up?

A I'd say about 7:30 or 8:00.

Q In the evening?

A Right.

Q Now, let's start with the area surrounding the house. There were policemen in the area surrounding the house, weren't there, other than you?

A Surrounding the house?

Q Let's say there are two roads.

A Right.

Q And this house is on this particular piece of land on the corner of the intersection of two roads?

A Okay.

Q COrrect? Do you remember that?

A (Witness indicates yes.)

Q Now, were there policemen stationed on either of those two roads?

A I know of one for sure. The other, I can't say. I don't know.

[442] Q Well, which one for sure?

A The one in front of the house.

Q The one that leads to the INterstate – the main road, 349?

A The one, right, I believe went to the Interstate.

Q Well, where were the police on this main road?

A I think they were about a mile down the road on the same road the house was on – that Route 1 or whatever.

Q Okay. A mile down the road. And how many cars were there?

A One.

Q And beyond that, there were numbers of other police vehicles stationed periodically?

A I'd say they were in the area.

Q In all directions, so they could go wherever they wanted so the trucks would always be under surveillance; correct?

A That's right.

Q And how many cars do you figure were involved in that?

A I'd say four, maybe five.

Q Now, in addition to surveillance of the vehicles in movement, if they ever got into movement — by the way, these trucks never moved out onto the road, did they?

A No, they didn't.

Q In addition, were there any other law enforcement officials observing the scene?

A No, none.

Q Just you?

[443] A Myself and Trooper Jejeune.

Q Now, what was the plan for you and Trooper Lejeune?

A We were to sit there; and as soon as we saw the trucks start up and leave, to give notice to the surveillance team.

Q All right; so your function was to sit there and wait until the trucks moved out onto the highway and then to give notice; correct?

A Well, to give notice as they were starting to leave.

Q As they were starting to leave?

A Correct, and give directions as to which way they were going.

Q At which point, the surveillance would commence?

A Right.

[443] [444]

Q Now, were there aircraft flying over the property as part of the surveillance?

A Not at that time, there wasn't.

Q Later?

A There was one in the air, and I told them not to come over the property.

Q Did he come over the property?

A I don't believe so.

Q Do you know, or are you guessing?

A Well, he didn't go over the property, no. He returned to the airport.

Q Was he in the area so that he could see the property from the air?

A No, he couldn't see the property at night time.

Q Now, you came onto the property at what hour?

A You mean, the cane fields?

[444] Q I mean, property. What hour?

A Which property?

Q Let me show you something. Can you identify this photograph for me?

A Okay.

[444] [445]

BY MR. BURKE: Your Honor, if the witness is going to testify from a photograph, I want it to be marked and we might look at it.

BY MR. HALL: Sure, go ahead. Be my guest. I believe that's "D-5".

(Discussion off the record.)

Q Here's a red pen. Now, let's start. You came onto the scene at approximately 8:30; right?

A That's right.

Q Okay. How did you get onto the property? From the road?

A Right, from the road.

Q Good. Now, at the point you entered this particular property, cane field or whatever, would you please put a Number "1" on the photograph?

A Where I entered the cane field?

Q Where you entered.

[455] A It's not on the photograph.

Q It's not?

A No, sir.

Q I'll try another photograph. Is it on the photograph (indicating)?

A Let's see here.

Q Is it on that photograph (indicating)?

A Okay, it's on this one.

Q You find a photograph that you can enter the place?

A That's what I said. Down here (indicating).

Q Fine. Let's mark this as the next exhibit.

BY MR. HALL: Your Honor, this will be "D-6".

Q Okay. Show us where you entered the property.

A Okay.

Q By the number "1".

A (Witness complies.)

Q All right. Now, did you remain at Point Number One?

A No, I didn't.

Q You moved. You moved directly into the position to make surveillance; did you not?

A Right.

[445] [446]

Q All right. Now, would you take an arrow and draw an arrow from Number One to where you set up your surveillance post, and write the number "2" at that location. Just show me how you walked.

A (Witness complies.) Okay. Now, what did you want here again?

[446] Q Where you set up your surveillance, write the number "2".

A Okay. (Witness complies.)

Q Thank you.

(Discussion off the record.)

Q Now, you and the State Trooper were together at all times, were you not?

A That's correct.

Q Now, tell the Court what type of equipment you had on your person at this time.

A Okay. I had a pair of military night-scene goggles and Trooper Lejeune had a pair of civilian-made — It's called a Starlite scope to see at night time, and he had a pair of binoculars.

Q All right, sir. That's all the equipment you had?

A And one Customs radio.

Q He did not have a radio?

[446] [447]

A No, sir.

Q So the only communication that you could have had with any other law enforcement officers came from contact you had on that radio with any other Customs officers in the area; correct?

A That's right.

Q And that's because Customs uses a separate frequency than generally used by law enforcement officers in the community?

A That's right.

Q Now, when you got to the position where you started [447] the surveillance -- by the way, how tall was the sugar cane at that time?

A I'd say waist-high.

Q And did you walk in a fully-erect position?

A Yes, sir.

Q All the way through?

A All the way.

Q You made no attempt to conceal yourself?

A No, sir.

Q And you are certain about that?

A Yes, sir.

Q What about the follow who was with you? Him, too?

A That's right.

Q Now, you got into the position of "2", and what did you do?

A Sat down and waited.

Q Sat down and waited. Well, was it dark?

A Very dark.

Q Did you look at the house?

A We looked at the house, looked at the trucks, looked at the cane fields.

Q Looked all around?

A Looked all around.

Q Did you do that with your naked eye?

A Couldn't see much with the naked eye.

Q I'm sorry, sir?

A I couldn't see much with the naked eye.

Q Well, what did you use to help you see?

A Starlite scope, night goggles.

Q Now, you wear glasses, don't you?

[448] A That's right.

Q What's the problem with your eyes? Do you wear glasses just for cosmetic reasons, to look better? Or do you have a problem with your eyes?

A I'd say I can't see distance without my glasses.

Q You can't see far away?

A Right.

Q Now, the night vision scope that you had of the military – describe how that fits. How do you use it?

A You can hold it up to your face or you can have straps so you can wear it on your head, say, if you want to drive a car.

Q Did you have straps?

A I didn't wear it. I just held it up and looked through it.

Q Held it up and looked through it how?

A Same as a pair of binoculars.

Q There's no magnification, is there?

A No, but you hold it up the same as you hold up a pair of binoclulars.

Q And all that's supposed to do is allow you to see as if it were a brighter condition; correct?

[448] [451]

A It allows you to see what you can't see in the dark.

Q I think that's what I'm saying. Now, did you lift your glasses off as you looked into these night binoculars that you had?

A No, I didn't.

Q What did you do? You put the eye pieces against the

* * *

[451] A That's right.

Q And you looked at the trucks?

A That's right.

Q And they were right near the house?

A Well, they were on the road in back of the house and on the road on the side of the house.

Q You mean, the driveway?

A No, I mean road.

Q It's a road?

A Yes, sir, that's a road.

Q Parish road?

A I don't know what kind of road it is, but that's a road.

[451] [452]

Q You mean, this little white thing here (indicating)?

A (Witness indicates yes.)

Q We're talking about the same thing. Okay. When you first started observing, what did you see?

A I saw a house, trres, three trucks.

Q Did you see people there?

A I saw people moving about in the back yard.

Q Moving about? Weren't they just having a barbecue?

A Moving about.

Q Sir, where they having a barbecue? "Yes" or "No"?

A Yes, they were.

Q Your statement was when they're having barbecues they're moving about?

A Well, they'd walk back to the truck, walk back to the house.

Q And they were having a good time; they were enjoying themselves?

[452] A I don't know if they were enjoying themselves or not.

Q Were you observing people that appeared to be enjoying themselves?

A I couldn't tell about that.

Q By the way, were they eating?

A I couldn't see them eating.

Q Then how did you know they were barbecuing?

A Smell it, watch the smoke coming up in the backyard.

Q Okay. Did you hear conversation?

A No, I didn't.

Q Did you hear laughter?

A I don't remember.

Q Did you hear music?

A I hear music.

Q And people were moving about around the house and occasionally out to the trucks?

A Right.

Q And how long did that continue, please?

A I would say until about 11:30.

Q Well, was it 11:30, or was it about 11:30?

A I'd say about 11:30.

[452] [453]

Q And you were in radio contact with Richard Joachim, weren't you?

A Off an on.

Q What happened at 11:30?

A The back light of the house went out – the back light to the house like a back-porch light or a light to shine on the backyard.

Q Stop right there. The back-porch light went out. Do [453] you know whether or not there was a woman and children living in that house?

A No, I don't.

Q So you wouldn't know whether or not they were tired for the night and turned that light off so they could sleep, would you?

A No, I don't.

Q Okay. All you know is the back-porch light went off?

A Right.

Q Okay. After the back-porch light went off, what happened next?

A Can I back up a minute?

Q Sure.

A Thank you. A vehicle showed up.

[453] [458]

Q A vehicle?

A Right – car – passenger car showed up about at that time, 11:30; and that's when the light went out.

Q At the same time the vehicle came?

A Right after the vehicle.

Q Did you see somebody get out of the car?

A No, I didn't.

Q So all you know is that there was some proximity in time from the time the automobile arrived at the home and the back porch light went out?

A Well, somebody arrived in the car and walked to the back of the yard.

Q I asked you if you saw anybody in the car, and you said, "No;" and now your're saying somebody walked from the car to the house. Now, which

* * *

[458] A No.

Q No? So you did see them turn it off?

A No, I didn't. Somebody had to turn it off.

Q These units never have a mechanical failure and go off by themselves?

A It's possible.

Q Certainly. Anyway, for whatever reason, the unit went off; correct?

A That's right.

Q Then what happened?

A They started the eighteen-wheeler up.

Q Who is they?

A Whoever was there.

Q How many people?

A I didn't see how many were there at the time.

Q Which persons? Any of these men here start that trailer up?

A I didn't see them.

Q You didn't see none of them. It was a person other than these seven people; correct?

A Pardon me?

Q A person other than one of these seven men started that trailer up; right?

A I wouldn't say it was other than those seven men. I'd say one of them did.

Q But you don't know which one?

A No, I don't.

Q So, therefore, it might have been somebody else, too, entirely; correct?

A It's possible.

[459] Q Okay. Let me go back to the refrigeration unit turning on and off. You live in New Orleans, don't you?

A Yes, I do.

Q Does your home have an air-conditioner in it?

A Yes.

Q Central air-conditioner?

A Right.

Q And it has a thermostat in the house; right?

A Correct.

Q You know, and when the termperature goes to a certain point, it goes on automatically; and when it drops below a certain point, it goes off automatically; correct?

A Correct.

Q Did you check and see whether or not this truck had a thermostat?

A I didn't go near it.

Q So, if it had a thermostat, certainly that's the best explanation for why the refrigeration unit went off?

A No, I disagree there.

Q You disagree, but you didn't see a thing. All right, let's go on. Now, you saw a person who you cannot identify. Can you describe him?

A No, I can't.

Q Anyway, this mysterious person turned the eighteen-wheeler on; correct?

A That's correct.

Q And what did this mysterious person do at that time?

[46] A Started to move it.

Q Where?

A Well, at the time the truck started up, I called the . . . .

Q Sir, the question is, where did he move it to?

A To back it up.

Q And you were on the radio with Agent Joachim; correct?

A That's right.

Q Sir, would you please indicate the spot that you were sitting at in this sugarcane field at the time that the eighteen-wheeler was turned on? I'm referring to "Defendants' Exhibit Seven". Put a little "X".

A Let me see here.

[460] [462]

Q Take your time.

A I will.

Q You've marked the "X"; correct?

A That's correct.

Q Now, on that same photograph please indicate as best you can the eighteen-wheeler and where it was. Why don't you draw it.

BY MR. KLEPPNER: Your Honor, I have a legal pad, if that's all right.

A No, I don't need anything.

Q You don't need anything?

A No. I know where it was parked, but not how it was parked.

* * *

[462] The word "truck" is written over a large area. Was it on the inside of that little driveway, on the outside, on the driveway? Where was it?

BY THE COURT: I would suggest, Mr. Hall, that if you're going to get the kind of answer you want, use the terminology he uses. He doesn't call that a driveway.

A Driveway right here.

[462] [463]

Q Where was the eighteen-wheeler in relation to — what do you call that? A road?

A Road.

Q Okay, where was it?

A Right here. Before or after it backed up?

Q Before it backed up.

A Right about here (indicating).

Q About here, referring to the inside — the residential side of the roadway; correct?

A I'd say so.

Q Okay. Ane one bobtail was directly on the roadway and the other bobtail was on the grassy portion of the field in which the trailer-house is located; correct?

A I'd say so.

Q No, sir, I'm going to hand you "Defendants' Exhibit Eight". Now show me how the trucks were located [463] after the eighteen-wheeler was backed up by the mysterious person.

A You just want the one truck or all three of them?

Q All three, if you would.

A After the eighteen-wheeler was moved (indicating).

[463] [464]

Q Okay, so the large rectangle indicates the eighteen-wheeler that is positioned next to the photograph of the boat in the picture; correct? Why don't you put an "18". Mr. McHugh has got a good idea there.

A (Witness complies.)

Q Okay, and the other two rectangles are still the bobtail trucks; correct?

A That's correct.

Q Okay.

BY THE COURT: The two bobtails are in the same position as you marked before in the other photograph?

A At this time, right.

Q Now, in comparing the two pictures, actually the eighteen-wheeler was only moved onto that road?

A I would say so.

Q Correct?

A That's correct.

Q So it was moved a foot or two or three; no significant movement?

A It wasn't a far distance, no.

[464] Q You can't estimate how far it was, can you?

A No, I couldn't.

Q Okay. The eighteen-wheeler was moved and then brought to rest; correct?

A Right.

Q Did the mysterious person turn the eighteen-wheeler off at that point?

A Yes, he did. I believe he did. I think he shut it off. I don't remember if he turned it off or not, but I think they shut the motor off.

Q You don't remember, so it could have been running or it might not have been running; you don't know; correct?

A I'll have to think. Just give me a chance. Okay. They shut it off. They did shut the motor off.

Q Now, what in your mind refreshed your recollection as to whether they shut it off?

A Because we could hear the door slam to the truck, could hear the back door open on the -- the tailgate on the truck.

Q Now, at the time that the truck was turned off — and again, did the mysterious person get out of the truck?

A I didn't see anybody get out of the truck.

Q So he may have still been in the truck?

A Could have been.

[464] [465]

Q And you don't know who or where or what happened to this person from that point on that night? Correct?

[465] BY MR. GUIDRY: Your Honor, I'm going to object. He said he didn't know who got out the truck, so how is he going to answer that question?

BY THE COURT: Well, that's a different question.

BY MR. GUIDRY: Yes, sir, but it's impossible for the witness to answer.

BY MR. HALL: Your Honor, I don't mind being ganged up on a whole bunch of times, but I think I've had objections and comments from all three of these assistant District Attorneys now. Can I just deal with one of them?

BY THE COURT: Well, I think they've had the same problem. At any rate, the objection is overruled.

Q Now, did you happen to at any time later on in the evening observe that the doors of those trucks [466] were trimmed with rubber?

A No, I wasn't looking for that.

Q So you don't know whether or not doors trimmed with rubber slam — make slamming noises?

A I don't care what it's trimmed with, it's going to make a slamming noise, no matter what.

Q If you say so. And at that point, sir, what did you observe?

A After they backed the truck up?

Q I think that's where we are, the first truck that you put on the so-called road.

A All right. That's when approximately six or seven people showed up around the trucks and somebody went to one of the bobtail trucks and started it up, and then somebody backed — started backing the truck towards the eighteen-wheeler.

Q Let me see if I can get this straight. Six or seven men appeared, and you don't know how many; correct?

A No, sir.

Q Now, you were looking through that night scope, were you?

A (Witness indicates yes.)

Q Which one of these men, if any of them, went to the bobtail truck?

A I can't identify any right now.

Q You can't identify anybody. All right. But somebody -- another mysterious person, perhaps -- went to the bobtail truck and backed it up; correct?

A Correct.

[470] A I don't think so, not the way they were climbing in the back of the trucks.

Q So you conclude that they were eighteen inches, because you saw men making entry and exit into the trucks?

A Right, from the side of the back of the truck instead of going actually into the back.

Q From the side of the back. Now, therefore, all you know is that a man can get his body into the truck, and whatever width would permit that is the width that was there then; correct?

A That's correct.

Q And that is the fact that you know. Now, so that we're clear at this point, you couldn't see into either truck, could you?

A You've forgotten they opened up the door of the truck, though, prior to backing up.

Q Sir, I asked you what happened, and you told me that the trucks moved together; you didn't tell me about an opening door; but if You.d like to, tell me now. That's fine.

A Okay, I will. The door of the eighteen-wheeler opened up and we observed bales of marijuana inside it, and that's when the — for about, I'd say, a minute, not even a minute, and that's when the bobtail backed up to it and . . . .

Q No, let's deal with fact, shall we, sir?

A Go ahead.

Q Facts as they existed when you looked. Now, sir, look at those two doors right in the back of the court- [471] room. Tell me what's behind them right now, right now.

A Behind the two doors . . . .

Q No, tell me what's behind them. Look through those doors. Tell me what is behind them.

A Hallway.

Q And who is in the hallway?

A I haven't the slightest idea.

Q Why not?

A I can't see through the doors.

Q Correct. Now, let's talk about the bales. Could you see through these bales? Were these x-ray scopes of some type?

A No, sir.

Q So all you saw were bales.

A No, sir, I saw bales of marijuana.

Q Sir, did you see inside the bales? "Yes" or "No".

A No, I didn't.

[471] [472]

Q Did you smell an odor of anything? "Yes" or "No".

A No, sir.

Q Did you see marijuana gleanings around the premises? "Yes" or "No".

A No, sir.

Q All you physicall saw were bales; correct?

A No, sir, I saw bales of marijuana.

Q You conclude there was marijuana in it; you did not see marijuana with your own eyes; is that correct?

A (No response.)

Q Sir, is that correct?

A Did I see bales? Did I see marijuana with my own eyes?

[472] Q Yes, sir, your own eyes - those which God gave you.

A I saw bales of marijuana.

Q Tell me what's in my briefcase, sir.

A I can't see through it.

Q But you can see through bales?

A No, sir.

Q Then you could not see through these bales?

A No, sir, I could not.

Q But you can say in your heart that you knew through some divine power marijuana was inside these bales, notwithstanding the fact you couldn't see into them; is that it?

A Marijuana bales are very distinctive.

Q Well, okay, good. Let's talk about that. In your lifetime, sir, have you ever been a smuggler of marijuana?

A No, sir, I have not.

Q So your only experience comes in the few incidents in which you have seen them in your official responsibility; is that correct? "Yes" or "No".

A That's not correct.

Q You've seen them socially?

A No, sir. Training.

Q And how many times have you seen bales of marijuana?

A How many times have I seen bales of marijuana?

Q Sure.

A I can't count how many ties, but I'd say at least twenty.

Q At least twenty. Now, how many arrests have you been involved in where you've seen bales of marijuana?

A I can remember about seven.

Q Seven. Now, did you experience these after the arrests were made or before?

A Prior.

Q Prior. In these instances, did you smell the odor or marijuana?

A No, sir.

Q Never. Or did you see gleanings of marijuana?

A No, sir.

Q All you saw were bales; and after the arrests were made, you learned marijuana was in them?

A I knew marijuana was in it before I saw it — saw inside it.

Q Now, Mr. Wade . . . .

BY THE COURT: Let me get one thing straight. Was your answer, "I knew marijuana was in it before I saw inside"?

A That's correct.

Q Describe for me the bales.

A I'd say thet're about three foot . . . .

Q No, sir. Not "about". Describe for me exactly.

[473] [474]

BY Mr. McHUGH: Your Honor, I'm going to object. He's trying his best to answer the question.

[474] BY THE COURT: You can ask him for his best description.

BY MR. HALL: Let me start this way:

Q Can you describe the bales exactly? Are you able to do that?

A No, sir.

Q All right, then, give me your best description.

A I can give you my best?

Q Yes.

A I'd say about three foot, eighteen by twenty-four, squared off.

Q Let's go slow. Three foot in one direction. The bales are about three foot high?

A Three foot hig; laid down, three foot long.

Q Okay. Eighteen inches wide; correct?

A Right.

Q Twenty-four inches across; correct?

A That's correct.

[474] [475]

Q Now, sir, and they're squared off. What do you mean by that?

A It's oblong instead of rounded; corners.

Q The corners are square?

A Right, the corners are square instead of rounded.

Q Rounded like that (indicating); big curves.

A Right.

Q Are they as square as the angles on this photograph? Are they true ninety-degree angles?

A It'd be rounded.

[475] Q They're more rounded than that. All right. Are they gently-squared, is that is, sort of a rounded edge, but basically swuared off?

A They'd be squared off, but not to a point.

Q Not to a point; and when you say rounded edges, you're talking about where there's no apparent squaring at all, just a round-shaped type of point?

A In other words, you look at it and you'll see four corners.

Q Four corners. All right. Now, the night in question when you saw these bales, you saw objects that looked to you to be bales that were three feet by approximately twenty-four inches by eighteen inches; is that right?

A That's correct.

[475] [476]

Q Now, how were you able to make an instant determination of the measurements of the bales? How many yards away were you?

A About thirty-five yards.

Q Thirty-five yards, so that's about longer than the entire length of this courtroom, isn't it?

A I don't think so.

Q Well, tell me — step it off.

A Thirty-five yards?

Q Show me the distance from your seat to where you were at the time.

A I can't do that.

Q Why?

A I didn't measure it at the time.

[476] Q Well, from you visual perception here in the courtroom -- you say you had good vision. Show us how far away that it looked approximately the same. Step it off. Come on.

A Okay. Stepping it off – well, it wouldn't do any good, because I didn't count . . . .

BY THE COURT: We'll just go in a straight line from where you are to whatever . . . .

[476] [477]

Q I'll go back. Tell me when to stop.

A That's fine right there.

Q Right here?

A You can step up a little bit.

Q Okay.

A Step forward a little bit. That's good. That's fine.

BY MR. KLEPPNER: Your Honor, before anything further happens, I'd like to pace that off myself, just for my own knowledge.

BY MR. ANDREW HALL: All right. Would you let the record reflect that the distance is the distance from the witness chair to the fourth bench from the rear of the room. [477] We'll offer to measure it later.

BY THE COURT: The back of the fourth bench?

BY MR. VIDRINE: The fourth bench from the rear of the courtroom.

BY THE COURT: The back of the bench?

BY MR. VIDRINE: Yes, sir.

BY THE COURT: Okay, at a point in the middle of the aisle.

BY MR. ANDREW HALL: Yes, sir.

Q Now, at that point you observed these bales in the back of the truck. Which truck?

A The eighteen-wheeler.

Q All right. And that was some time around 11:30, 11:40, 11:50? What time was it?

A I'd say about 11:30, 11:40.

Q Somewhere in there?

A In there.

Q Could you observe the covering of the particular bales?

A No, I couldn't.

Q You could not?

[478] BY THE COURT: That was the covering?

BY MR. HALL: Yes, and he said he could not.

Q Then you were with Officer who at the time?

A Lejeune.

Q Lejeune, and you and he were talking about what you observed; correct?

A That's correct.

VOL. III

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2045

JEFF H. DUPUIS, BERNIS H. DAVISON
JOHN ZERBE and WILBUR L. SMITH

Petitioners

VERSUS

STATE OF LOUISIANA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

GRISBAUM & KLEPPNER
FERDINAND J. KLEPPNER
Professional Building
3224 North Turnbull Drive
Metairie, Louisiana 70002

ATTORNEYS FOR PETITIONERS

[478] [479]

Q And your conversation with him confirmed the fact that you both saw bales of the size you just indicated, but you could not see the covering; correct?

A I don't think we discussed the covering.

Q You didn't discuss the covering at all; correct?

A Correct.

Q Did you discuss the weight of these bales?

A No, sir.

Q As a matte. of fact, you couldn't tell the weight, could you?

A No, sir.

Q Now, to be sure through these devised that you had on your head — or you couldn't see color at all, could you?

A No, sir.

Q So all you could tell was that there were bales of this size, three foot by eighteen inches by twenty-four with gently squared-off corners; correct?

A That's right.

[479] BY MR. HALL: Your Honor, can we take a recess? We'd like to show him — have we got any bales in yet?

[479] [480]

BY MR. McHUGH: No.

BY MR. GUIDRY: They haven't left yet.

BY MR. HALL: They haven't left yet?

BY MR. GUIDRY: That's correct. Your Honor, I contacted the crime lab and they said they don't have anyone to bring them here at this time. They were supposed to get in touch with me about this time to let me know what their intentions were.

BY THE COURT: What do you mean, "Their intentions"?

BY MR. GUIDRY: Well, whether they were to find somebody to bring it or whether we were going to have to send someone to pick up the bales.

[480] (Discussion off the record.)

Q You recognize this (indicating) as the truck, don't you?

A Yes, sir, I do.

BY MR. McHUGH: Can we have it marked?

BY MR. HALL: Sure. Mark this.

Q This is the truck and these are the bales that you saw that night?

A Yes, sir, that's them.

[480] [481]

Q And in each instance you'd say that's three feet long, approximately; correct?

A That's . . . .

Q That's what you just said.

A I'd say that's eighteen by twenty-four there.

Q We've had part of this a close-up. Does that help you identify it a little better?

A The same thing. I didn't tell anybody that night that I saw three-foot, eighteen-by-twenty-four bales.

Q You just said bales?

A Absolutely. That's all I needed to tell them.

Q Okay. Let's mark this as the next exhibit. Let me show you this photograph of an even closer picture of the bale. Is this the type squared-off corner you're talking about?

[481] BY MR. McHUGH: Let's have them marked so the witness can identify them.

Q Is that the squaring-off that you're talking about?

A I'm talking about by "squaring-off", this here.

Q Not like that on that corner? Or is that a different angle?

A That's laying on the ground. I didn't see anything laying on the ground.

Q So you can't help me with this?

A No, I can't.

Q But that's a bale like you saw that night, isn't it?

A This is what I saw right here.

Q Is that a bale like you saw that night?

A I'd say it is.

BY MR. HALL: We'd offer these, "12", "10" and "11". Let the record reflect that he's identified the bales that he's certain were there-- in the truck as "10", and the bale that looked like what was from the other batch as "12".

A I don't know what he means by "from the other batch". He just asked me before if that bale looked like one of the other bales, and I said, "Yes."

Q So that's twelve. Thank you.

BY MR. HALL: Your Honor, could I have about a two-minute recess?

R E C E S S

Q So we can identify the dimensions of the bale for His Honor better, this line is approximately thirty-six inches; correct?

A Right.

Q Okay. And when you said eighteen inches, you're talking about from the ground ....

A To the top.

Q To the top; and the twenty-four inches is across from --- you know, actually parallel to the ground -- correct?

A That's right.

(482) (483)

Q And the squared-off corners are as you see it in the photograph; correct?

A That's correct.

Q And that in your judgment is a bale of marijuana?

A That's correct.

Q All right.

(483)

BY MR. HALL: We'd offer "Exhibit Thirteen".

(Discussion off the record.)

Q Thirty-six inches; correct?

A Correct.

Q Twenty-four inches across; correct?

A Correct.

Q And twenty-four inches; correct?

A Correct.

Q All right. Square corners? Just like this one?

(483) (484)

A That's very good.

BY MR. HALL: We would offer this.

Q Okay, come down here and open it up. Tell us what you find in it.

A (Witness complies.)

Q What do you find in it?

A Peat moss.

Q Now, let's open it up from the top. Let's see what it says. I think what it says is --- son of a gun. It says, "Peat Moss, Commercially Blocked." And that's the way it looked that night; correct?

A That's correct.

Q So, for that matter, if the truck had been filled with those bales, you would have said bales of peat moss were bales of marijuana; you wouldn't have known?

(484)

A I knew it was bales of marijuana.

Q Sure. How did you know? You couldn't see inside; and that bale

is identical in size and shape to ones you watched that night. How did you know?

A Past experience.

Q Psychic, I guess.

BY MR. McHUGH: Objection.

Q Well, let's deal with objective facts. An objective fact -- they're identical -- correct?

A Very close.

Q So in terms of subjective facts, you went there looking for marijuana and you were not looking for peat moss; correct?

A No, sir, I didn't even go there looking for marijuana.

Q But it is correct they look exactly alike?

A Yes, sir.

BY MR. HALL: That's all I have.

(484) (488)

BY MR. KLEPPNER:

Q Referring to "D-10", when you looked in the back of that truck, was that the extent of the bales in the truck?

A No, sir. The first time?

Q Yes, the first time.

A It was --- just guessing, I'd say less than half full.

(488)

off on the surveillance units, that they appeared to be going to back up the trucks together; and that's when the door on the eighteen-wheeler opened up and we saw the bales of marijuana inside; and the bobtail truck started to back up, and I called on the radio and told him that the truck was already loaded and to hold off on the surveillance units, because they were transferring the cargo from the big truck to the little truck.

When the little truck pulled away, there were more bales in the eighteen-wheeler; and I corrected myself and told him that they were not loading the little trucks, they were loading the big truck with bales of marijuana. Then I observed

two of the people that are sitting over there now run and start the third truck, which they had trouble getting started; and they finally got that one started and backed that one up to the eighteen-wheeler; and I told him that they only had a short time to go before they'd be unloaded and probably be leaving the area, that they'd better hurry up, whatever they were doing; and that's when Joachim said that they had obtained a warrant and would be there momentarily.

Q How long after that information from Joachim that they would be there momentarily did they arrive?

A I'd say about five minutes.

Q I believe on direct examination one point you testified -- that the lights in the area were put out?

A The lights on the house were put out, and the trucks (489) were driving around without lights.

Q Were there any lights at all in sight at the time of the movement of the cargo?

A There was the cargo light inside the bobtail truck was on.

Q Was this a momentary thing, or was this on continuously?

A The light was on continuously, but you couldn't see anything until the bobtail truck pulled away from the eighteen-wheeler. You could see the -- it would light up the inside of the eighteen-wheeler, and you could see ....

Q The source of the light was where?

A Inside the bobtail truck.

Q All right.

BY MR. BURKE: I have no further questions.

(Discussion off the record.)

REDIRECT EXAMINATION

BY MR. ANDREW HALL:

Q Sir, we have a little confusion in what you just said. The bobtails --- the eighteen-wheeler, that moved a few feet, a foot or two, to get on the roadway; correct? The first truck to move was the eighteen-wheeler put on the roadbed; right?

[500]

DIRECT EXAMINATION

BY MR. ALLEN HALL:

Q. Mr. Woodbury, please examine the original wrapping of that package.

A (Witness complies.)

Q Disregarding the outside visquine cover. Is this the original packaging?

A Yes, it is.

Q Tell us what type of material this is.

A Plastic.

BY MR. HALL: No further questions.

(Witness excused.)

BRENDA DUPUIS, HAVING BEEN CALLED AT THE INSTANCE OF THE DEFENSE, AND HAVING BEEN DULY SWORN ACCORDING TO LAW, DID SAY:

DIRECT EXAMINATION

BY MR.. CHESTNEY:

Q Please state your name.

A Brenda Dupuis.

Q Where do you live, Mrs. Dupuis?

A Route 1, Box 674, Breaux Bridge.

Q Is it Mrs. Dupuis?

A Mrs.

Q What is your husband's name?

A Jeff.

Q Jeff Dupuis. Is he one of the defendants in this case?

A Yes, sir.

Q Is he in the courtroom?

A Yes, sir.

Q Can you point him out to us?

A He's the second one on the right.

BY MR. CHESTNEY: The record will reflect that the witness has identified the defendant Jeff Dupuis.

Q And your address is Route 1, Box 3 -- what was it?

A 674.

Q Is that located at the corner of Highway 349 and Parish Road?

A Yes, sir.

Q Mrs. Dupuis, I'm going to hand you a photograph marked — admitted into evidence as "Defendants' Exhibit Six" and ask you if you recognize the photograph or what is pictured in the photograph?

A Yes, sir. This is our house.

BY MR. CHESTNEY: Would the record reflect that the witness has pointed to the house located within the shell driveway forming the rectangle with the intersection of Highway 349 and the parish road.

Q Now, who lives there in that house with you, Mrs. Dupuis?

A My husband, and I have two children and an elderly grandfather.

Q And they all live in that home with you?

A Yes, sir.

Q Now, who owns the property?

A My husband.

Q Are you familiar with where the property extends?

A Yes, sir. Our property goes back here to — I think this is the ditch.

Q Would you show the judge the ditch?

A Yes, sir. Right here (indicating). And then we're bounded, of course, on this side by the highway and by the parish road, and then part of the boundary goes through some — the trailer is sitting on some of our property here.

Q And does it extend on back to ditch?

A Yes, all the way back.

Q Now, you see on this photograph, Mrs. Dupuis, that there's some arrows drawn across in red ink and ending with the number "2".

A Yes, sir.

Q Is the number "2" located on your property or on your husband's property?

A Yes, sir.

Q I'd like to show you another photograph. This has been admitted into evidence as "Defendants' Exhibit Seven". Does this also reflect your home?

A Yes, sir.

Q Do you see a red "X" marked on the photograph which appears to be to the south of your home?

A Yes, sir.

Q Is that "X" located within your property?

A Yes, sir.

Q Mrs. Dupuis, do you recall the night of June 15th and the early morning hours of June 16th?

A Yes, sir.

Q That was the night your husband was arrested, was it not?

A Yes, sir.

Q Can you tell us the events that you recall that evening?

A Well, I was — had just gone to bed and I was sleeping; and the first thing I remembered, someone — well, three were in my bedroom door and I was awakened with a flashlight in my face; and then I heard running through my house. You want me to finish all of it?

Q Go right ahead.

A And they told me that I had to get up, that I was going to be taken to St. Martinville Jail; and they took me into my living room and talked to me some more.

BY MR. McHUGH:

Q Mrs. Dupuis, how long have you been living at that residence?

A About two years.

Q And before that?

A In Southhaven, Mississippi.

Q How long did you live there?

A Five years.

Q You said you were living in this house, Route 1, Box 674, for about two years?

A Yes, sir. Approximately two years.

Q You live there with your husband and who else?

A I have two children living there and my elderly grandfather.

Q Who is your elderly grandfather?

A Mr. Loston Coleman.

Q I'm going to show you "Defense Exhibit Seven". I see a trailer.

A Yes, sir.

Q Now, you said something about the trailer not being on your property?

A There's just a small portion of the trailer on our property.

Q Where is your property line?

A Well, it's somewhere right around in there. I'm not sure exactly where.

Q The property line goes along like this?

A Well, yes, sir.

Q I'm going parallel to this State highway in front and perpendicular to the parish road; right?

A (Witness indicates yes.)

Q And it goes through the trailer?

A Well, just a small portion of the trailer. I don't know exactly . . . .

Q And how far does it goes this way to the south?

A It goes all the way to the ditch in the back.

Q All the way across this picture?

A Yes, sir.

Q Do you know who this property belongs to?

A Yes, sir.

Q It wouldn't be one of Mr. Dupuis' sisters, would it?

A Yes, sir.

Q Wasn't this part of a Dupuis estate that was divided?

A Yes, sir.

Q And your husband got this part; correct?

A Yes, sir.

Q Okay. Do you know who owns this property back here?

A No, sir.

Q If I'm correct, you have a fence around your house, don't you?

A Yes, sir.

Q Can you point that out to the Court?

A Yes, sir. The fence goes here and here and there's a small portion of it back here (indicating).

Q Okay.

(Discussion off the record.)

Q I'm going to show you what's been marked "State's Exhibit Number One". Can you identify this photograph?

A Yes, sir, that's my house.

Q Now, I want you, if you would, to draw a red line where the fence around your house is located.

A The fence? Okay. It probably won't be a straight line.

Q Do as best you can.

A There's a double gate right about here (indicating).

Q Why is that double gate there?

A That's so that I can drive my car through it.

Q Okay. You have a driveway there?

A Yes, sir.

Q Okay. Where is that?

A It's right about in there somewhere (indicating).

Q Well, let's put a little "D" for "driveway".

A Then the fence goes back here and then it goes right about there.

Q Okay, thank you very much.

BY MR. McHUGH: For the record, let's say the fence runs perpendicular to the State highway on the west side,

indicated by a red line, along the south side, and then in a northerly direction partially behind the house and on this gravel road or shell road, whatever it's been referred to.

BY MR. CHESTNEY: I believe you said it ran perpendicular . . . .

BY MR. McHUGH: Parallel to the State highway.

Q Now, did you tell me who lives in this trailer?

A No, sir, but I will.

Q Okay. Who lives in it?

A My mother and stepfather.

Q Do you know Mr. Davidson, who is a defendant in this case?

A Yes, sir.

Q Did he ever happen to live there?

A Yes, sir.

Q Is he in the courtroom?

A Yes, sir.

Q Can you point him out?

A He is the fourth one on this side with the sunglasses on.

Q With the white shirt?

A And the sweater.

Q Did you happen to see any of these other fellows on the 15th and 16th of June that are sitting back there?

A Yes, sir.

Q Were they all there?

A I don't know.

Q You've seen them before?

A Well, just here in the courtroom, that I can just remember.

Q But you do remember Mr. Davidson living in that trailer?

A Oh, yes, sir.

Q Do you think he was living there on the 15th of June?

A Yes, sir. He's my stepfather. My mother and my stepfather lives there. Mr. Davidson is my stepfather.

Q Thank you. The night in question, was there a barbecue in the back of the house?

A Yes, sir.

Q Do you know how many people were there?

A No, sir.

Q Why?

A Well, I was in the house.

Q You were in the house?

A Yes, sir.

Q You didn't participate in the barbecue?

A No, sir.

Q Any of your children? Did they?

A No, sir.

Q Do you know how long this barbecue went on?

A No, sir.

Q Do you know if your husband participated in the barbecue?

A No, sir.

Q You don't know?

A Well, I . . . .

Q Where was your husband at the time?

A I guess he was outside.

Q You guess he was outside?

A Yes, sir. I had gone in the house and I didn't see him anymore until . . . .

Q About what time had you gone in the house?

A Well, I had been in the house all afternoon.

Q Did any of the gentlemen who were outside in the back come into your home?

A Not that I recall.

Q They all stayed outside?

A Yes, sir.

Q Do you know how long they had been there?

A No, sir.

Q Just think about it for a minute. Were they there in the afternoon?

A Well, I had been in town all day long since early that morning, and I came home, and then I went to the grocery store; so I don't know exactly how long they had been there.

Q Let's say, when you came home from the grocery store, do you remember what time that was?

A No. It was late.

Q Was it still daylight?

A Just barely.

Q Were the gentlemen there then?

A Yes, sir.

Q Did you see any of them?

A Well, I didn't pay any attention to them.

* * *

[519] the trucks in your backyard?

A No, sir.

Q You didn't see any trucks?

A No, sir.

Q Do you know what an eighteen-wheeler tractor-trailer truck is?

A Yes, sir.

Q And you didn't notice that?

A No, sir.

Q And you didn't notice any short white aluminum trucks?

A No, sir.

Q What time did you leave that day?

A It was in the early morning.

Q You took your child?

A No, sir, not that day.

Q Who was taking care of your child?

A. My niece.

Q This property to the south of your house here, showing you "State's Exhibit Number One", seems to be a field with crops growing on it. Can you tell us what kind of crops that is?

A That's sugarcane.

Q Is that part of your husband's property?

A Yes, sir.

Q Who's farming that, do you know?

A Mr. Melancon.

Q How long has he been farming that?

A I'm not sure.

Q Has he been farming it as long as you've been living there?

[520] A Yes, sir.

Q Your husband is not farming it?

A No, sir.

Q Now, you say you're not certain when in time the men were in your house as compared to when your husband was arrested; is that correct?

A Well, I know when the men were in my house.

Q But you're not certain about what went on outside?

A No, because I didn't go out. They wouldn't let me go out.

Q I'm going to show you "State's Exhibit Number One" again. I see this what you've drawn with a red line indicating a fence. It seems like you have some shrubs planted along there; correct?

A Yes, sir.

Q Then toward the north you have — it looks like it's open.

A Yes, sir.

Q Who cuts this grass?

A Myself and my husband.

Q Do you do anything with this cane field here?

A No, sir.

Q How about in here around the trailer?

A Well, my stepfather cuts around the trailer and then the empty — the lot my husband cuts.

Q That's around where the boat is?

A Yes, sir.

Q You marked this "D" right here. That indicates the driveway where you put your car?

A Yes, sir.

[521] BY MR. McHUGH: Your Honor, in connection with the witness' testimony I'd like to offer and introduce this . . . .

BY MR. ANDREW HALL: No objection.

BY MR. CHESTNEY: No objection.

[521] [522]

BY MR. McHUGH: I tender the witness, Your Honor.

(Discussion off the record.)

REDIRECT EXAMINATION

BY MR. KLEPPNER:

Q Mrs. Dupuis, does your husband do any other mechanical work other than electrical work?

A Mechanic work?

Q Does he work on cars and trucks or anything like that?

A Yes, sir, sometimes.

Q Is this unusual, or does he often work on cars and trucks?

A No, it's not unusual.

Q Is it unusual for your husband to have around the house or the yard cars and trucks belonging to various people?

[522] A No, sir, it's not unusual.

Q Is it unusual for him to have people in the vicinity of your house that you don't know personally?

A No, sir, it's not unusual.

Q I'd like to show you "State's Exhibit One", if I may. I'll ask you if the shell driveway around the outside of the red line that you've marked "fence" is on your property?

A Yes, sir, it is.

Q Do you use it?

A Yes, sir.

Q Does your husband use it?

A Yes, sir.

Q Is it a public road or a private road?

A It's private.

Q Now, referring to the cane fields that Mr. McHugh mentioned, you stated that Mr. Melancon farms it; correct?

A Yes, sir.

Q Does he operate or farm them by authority of you and your husband?

A Oh, yes, sir.

Q Is it also correct that you and your husband regard those cane fields as your private property?

A Yes, sir.

BY MR. KLEPPNER: I don't have any other questions, Your Honor.

[523] BY MR. CHESTNEY: Your Honor, the only thing I'd like to do is make sure for the record that the second driveway

[523] [529]

that the witness referred to is identified; and in that regard I'd like for the witness to just place a "D-2" on the shell driveway referred to.

A (Witness complies.)

BY MR. CHESTNEY: Thank you.

BY MR. KLEPPNER: Your Honor, I'm going to at this time object again to recross on the part of Mr. McHugh. I'd like to note it for the record.

BY THE COURT: I'm going to overrule the objection for the reasons I made previously.

RECROSS EXAMINATION

BY MR. McHUGH:

* * *

[529] this yard or into the cane field to the left. I was just wondering if there was or not.

A Well, it would have been, as well as I remember, some stakes on the parish road line, but I'm not certain the other way. Not to my knowledge. I don't know.

(Witness excused.)

[529] [532]

CLARENCE THIBODEAUX, HAVING BEEN CALLED AT THE INSTANCE OF THE DEFENSE, AND HAVING BEEN DULY SWORN ACCORDING TO LAW, DID SAY:

DIRECT EXAMINATION

BY MR. CEDARS:

Q State your full name, please.

A Clarence Thibodeaux.

Q What is your address, Mr. Thibodeaux?

A Route 1, Box 192-K, St. Martinville, Louisiana.

Q What is your occupation?

A I'm a surveyor and a civil engineer.

Q How long have you been engaged in that occupation?

A Surveying, about ten years; and as far as a registered

[532] A Yes.

Q Marked in the northeast corner is "HSE". What does that stand for?

A This is the house of Jeff Dupuis.

Q Have you seen him in that house?

A Yes, I went in the house and talked to Jeff.

[532] [534]

Q Also noted on the survey, sir, is notations, "Sugarcane Field". How do you know that is a sugarcane field, sir?

A Well, I'm familiar — I'm raised in this area and, also, I went out there and checked it, myself; and it is a plowed sugarcane field. They have the roots of the old cane.

Q On the southern part of the survey I see, also, the word "Drainage Ditch"; and what exactly is that?

A There's a bit draingage canal for irrigation purposes.

Q Approximately how deep?

A Oh, a good ten feet deep.

Q You personally observed that?

A Yes.

Q And what is on the south side of that drainage ditch?

A Combination of pasture land and hog pen and also harvested corn field.

Q It's not sugarcane field, is it?

A No.

BY THE COURT: Did you ask Mr. Thibodeaux when he made that survey?

[534] A Yeah, I see the black mark.

[534] [535]

Q Is this drainage ditch shown in that photograph below that mark the same drainage ditch depicted?

A Yes.

Q. Does this drainage ditch form the southern boundary of Mr. Dupuis' property as you surveyed it?

A Yes, to the best of my knowledge.

BY MR. CEDARS: At this time I'd like to offer into evidence "Defendants' Sixteen" and "Seventeen" in connection with Mr. Thibodeaux's testimony.

BY MR. McHUGH: No objection.

BY MR. CEDARS: We have no further questions, Your Honor.

BY MR. KLEPPNER:

Q Mr. Thibodeaux, I'd like to ask you to again look at "D-16" and tell me if the southern boundary of the property, which you have labeled under the ownership — or, at least, the property that you surveyed as depicted on "D-16", if the southern boundary of that property is marked by any clearly distinguishable feature on the ground? And specifically referring to the southern [535] boundary . . . .

A I'd say it's the bank of that canal.

Q The bank of the canal?

[535] [537]

A Yes.

Q Is that easily recognizable on the ground?

A Yes, if you — you have to assume there's a line. There's no set markers or anything other than an iron rod.

Q The drainage ditch is clearly seen.

A Right. There's no fence.

BY MR. KLEPPNER: I don't have any other questions, Your Honor.

BY MR. ALLEN HALL: Your Honor, we present to the Court certified copies of the Act of Partition establishing the property of Mr. Dupuis.

BY THE COURT: You have two there?

BY MR. ALLEN HALL: Yes, sir. Three people signed one and the fourth signed the other.

BY THE COURT: It's in counterparts?

BY MR. ALLEN HALL: Yes, sir.

* * *

legal description of the name of Noah Hayes is for the same tract.

A Right.

Q Otherwise, it checks?

A It checks.

BY MR. ALLEN HALL: I have no further questions.

BY MR. CHESTNEY: Your Honor, I don't believe the record reflects the numbers given to those last two documents admitted and to which the witness was referring.

BY THE COURT: "18" and "18-A", defense exhibits.

CROSS EXAMINATION

BY MR. McHUGH:

Q Clarence, the boundary markers you're talking about, describe them for the Court.

A Butch, that northwest boundary marker is an iron pipe, and the boundary marker for Tract "A" is an iron rod -- which there's two

iron rods. There's one

(541)

Q Can you see whether you did any other work on the 9th or the 16th that would refresh your memory?

A The map was made the 15th. I usually make my map before I set my rods. In other words, everything checks before I set my rods; so it had to be after the 16th --- 15th --- when was the 15th?

Q Thursday.

A Well, it probably was the last Friday --- the next Friday.

Q All right. When you surveyed the property this time, you said you found a rod in the southwest corner.

A I found a rod in the southeast corner of the estate. All I ran a survey was on the estate, itself.

Q Did you find this point?

A I found an intersection of two fences which I tied in, which I was off about a foot; so I honored Spike's survey on that, because he had it recorded and ....

Q You say there was a fence post right there?

A Yes.

Q So this was a point that had been marked?

A Yes.

Q As private property?

A Right.

Q Thank you.

BY MR. ALLEN HALL: No further questions. Let the record reflect that the witness (542) identified the terminus of the curve on Louisiand Highway 349 where the curve and the straight line meet.

BY MR. McHUGH: That's on the west boundary?

BY MR. ALLEN HALL: That's on the west boundary, that's correct.

BY THE COURT: Where the curve and the straight line meet?

BY MR. ALLEN HALL: Yes, Your Honor. That's in the proximity where Officer Wade was observing.

(Witness excused.)

CARL BLANCHARD, HAVING BEEN CALLED AT THE INSTANCE OF THE DEFENSE, AND HAVING BEEN DULY SWORN ACCORDING TO LAW, DID SAY:

DIRECT EXAMINATION

BY MR. ANDREW HALL:

Q Sir, please state your name.

Q On the 15th of June, 1976 (1978), did you have an occasion to be at Region Two Narcotis in Lafayette?

A No, sir, I was in Opelousas on that date.

Q Did you receive a call to come to Lafayette?

A Yes, sir.

Q In response to that call, what action did you take?

A I was notified over the radio to meet with fellow officers at the Hungry Hobo Restaurant in Henderson.

Q Did you do this?

A Yes, sir.

Q At this restaurant, what did you do?

A I was briefed by the officers of the possible marijuana-smuggling operation in the area there and they showed me the area.

Q All right. When you say they showed you the area, can you explain that?

A Yes, sir. They brought me to a residence that was located on La.

349, consisting of a house and there were two bobtails adn a refrigerator van there.

Q How do you know this?

A I was showed by the officers.

Q Were were you when you were showed this?

A In the vehicle with them.

Q After you had made these observations, what did you do?

A I then made a moving surveillance in my own vehicle.

Q For how long did you do this?

A From 3:30 until around dark, which would have been 7:30 or 8:00.

Q At that time, what did you do?

(567)

A Yes, sir.

Q After you made that report, what did you do?

A After the initial contact with Sgt. Trahan over the radio, we would more or less keep the house under surveillance and notify them of

any strange activity going on.

Q What activity did you see at this time?

A When we first went in?

Q When you first got in position.

A A barbecue going on with loud talk and music in the area on the south side of the residence more or less between the house and our position.

Q How do you know there was a barbeque?

A We could see the smoke and smell it.

Q Approximately how long did this go on?

A Until approximately 10:30 or a quarter till 11:00.

Q Did anything happen to cause the activity to be stopped?

A Yes, sir. When the barbeque was over, the lights were turned off in the area of the barbecue and one subject or approximately two walked into the refrigerated van and turned the refrigeration unit off.

(567) (568)

Q How were you able to see this?

A Through the Starlite scope.

Q Can you describe that scope to us?

A It's one-hand-held long tubular type with an eye cup pressed against your eye to activate it.

Q After the refrigeration unit was turned off, what happened?

A The men returned to the area inside the fence line. Approximately five to ten minutes later, a vehicle

(568)

pulled into the driveway immediately inside the fenced-in area.

Q All right, and then what happened?

A We notified over the radio Sgt. Trahan and Officer Wade of the activity that the people were starting to move around a bit.

Q After that transmission, what activity occurred?

A A few minutes after this, all the --- I say all of them --- all the ones we could see that were around the barbecue pit started walking through the backyard toward the

refrigerated van truck and the bob-tail.

Q Okay. When they got in the vicinity of these trucks, what activity did you observe?

A The rear door of the refrigerated van opened up. I was looking through the Starlite scope. Then we moved our position around so we could get a good visibility inside the van with the Starlite scope.

Q So you moved to another location?

A Yes, sir. We were moving with the personnel so we could kepp them under good surveillance.

Q About how far away were you from them at this next vantage point?

A From the refrigerated van?

Q Yes, sir.

A Approximately thirty-five to forty yards.

Q Now, through this Starlite scope, can you see color?

A No, sir, everything is green.

(568) (570)

Q When the doors to the refrigerated van were opened, what could you see?

A I could see bales stacked inside the refrigerated van,

(570)

the refrigerated van.

Q At this time, were you able to see anything?

A Yes, sir. There was a light emitting from the rear of the bobtail van shining directly into the rear of the refrigerated van where we could see there were more bales stacked in the refrigerated van than prior to the bobtail backing up to there.

Q What devices were you using at this time to observe these bales?

A When the truck first pulled away, I was looking with the naked eye. Then I looked to see the bales in there quite easily with my binoculars and adjusted them to my eyes, and it was the bales stacked roof-high on the rear side of the door. In other words, there's more bales than prior to the truck backing up. We could see it very distinctly.

(570) (572)

Q Okay. How long were you able to view this?

A Anywhere from fifty to seventy-five seconds. They were pulling away real slow from the refrigerated van with the bobail.

Q Were any radio communications made during this time?

A Yes, sir. Air Officer Wade was talking over the radio keeping Sgt. Trahan and Air Officer Rick up to date on the activity.

Q Did you, yourself, make any communications over the radio.

A Yes, sir.

Q When was this?

A Up to this time, Air Officer Rick had the radio and that was when Sgt. Trahan was on the other

(572)

Q And what did you see with your binoculars?

A The same thing I saw with my naked eye -- burlap bales of marijuana.

BY MR. HALL: Objection, Your Honor. That it was marijuana is a conclusion. He saw burlap bales is a fact.

BY THE COURT: I think that's a proper matter for cross.

Q Have you seen bales like that before?

A Yes, sir.

Q In what instances have you seen them?

A Prior marijuana smuggling operations.

Q And in those prior instances, what was in the bales?

A Marijuana.

Q The next thing that happened after the first bobtail was pulled away--what happened?

A The first bobtail was then parked to the side of the refrigerated van to the rear, and the second bobtail was approched by a couple of men and they attempted to crank it.

(572) (575)

Q During this time, was anything done to the doors of the eighteen-wheeler truck?

A Not to my recollection. I don't remember. I was concentrating on the men closest to us.

Q How close were they to you?

A Fairly close. Twenty-five to thirty yards away.

(575)

BY MR. ANDREW HALL:

Q Sir, referring to the picture that you just identified, the trucks were moved before that photograph was taken and that's not the way they were that night; is that correct?

A The bobtail was pulled up slightly, yes, sir.

Q The separation was farther apart?

A Yes, sir.

Q Trooper Lejeune, let's go to the day of the 15th when you arrived as part of this organized activity. You said that you were briefed by your fellow officers on a possible

marijuana smuggling operation. Can you tell us who briefed you?

A Well, a couple of them, more or less. Sgt. Trahan explained part of it to me. Trooper Ronnie Theriot explained some of it to me.

Q All right, let's start with Sgt. Trahan. What did he explain to you that day?

A He explained to me or told me what to do.

Q Well, did he brief you? Did he say that there's going to be a large amount of marijuana there or there the next day?

A No, sir. He explained we were to keep the particular house under surveillance and to report any activity that seemed out of the ordinary. We were to get any license plates on vehicles that might arrive or leave.

Q Let me get right to the point. You indicated in your testimony that you were told it was a marijuana-smuggling operation. Who told you (576) there would be marijuana there?

A We didn't know if it was there.

Q Somebody said it might be there. Who would that be?

A Possibly there; possibly waiting for it, maybe arrived prior. That's what we were there to find out.

Q You were there to find out, but you thought marijuana would be involved with those trucks and that house that day?

A Yes, sir.

Q Okay; so it is correct, sir, that when you arrived and started your surveillance, you were looking for marijuana; correct?

A Yes, sir.

Q So it's also correct that when you saw the bales, you didn't at least explore in your mind whether or not they might be bales of other substances, did you?

A No, sir.

Q Okay. Now, sir, let's start with activities between 3:30 and 7:30 in the day. When you say "roving surveillance", that's driving up and down the road, is it not?

A Yes, sir.

Q So you never left the car during those four hours?

A I might have. I don't recall. It's a long period of time. I might have stopped and got a Coke. There was three or four cars on surveillance.

Q I understand that, but you didn't go onto the property?

A No, sir.

Q Okay. Then come around dark, there was a change in your assignment?

(577)

A Yes, sir.

Q And who changed your assignment?

A Sgt. Trahan.

Q Sgt. Trahan instructed you to go with Customs Officer Wade onto the property; correct?

A No, sir, in a cane field adjoining the property.

Q Adjoining the property; so you were under the impression that the cane field was not owned by Mr. Dupuis when you went out there; correct?

A We were not aware of who owned it.

Q So you did not attempt to obtain permission from the owner?

A No, sir.

Q Moreover, you weren't particularly concerned about who owned it, you just wanted to get a good surveillance point?

A Yes, sir.

Q Now, you did indicate, sir, in your testimony that your surveillance was roving, moving.

A Yes, sir.

Q So that is that during this period of time you were at a large number of points; correct?

A Yes, sir.

Q Now, didn't you tell me the other day when we were chatting that you actually came out of the cane field and onto that shell roadway at least once?

A No, sir.

Q You didn't tell me that?

A No, sir.

Q You didn't come up to the shell road?

(578)

A I went to the ditch. I did not come to the shell road.

Q I show you a photograph that has been identified by your colleague that night, Mr. Wade, referring to "Defense Exhibit Seven". Now, you were in this cane field here, correct?

A Yes, sir.

Q But at times you came out of the cane field closer?

A Yes, sir.

Q Show me the closest point you ever got to that house.

A At the end of the cane field by the ditch.

Q Right here?

A I never got out of the line of the cane field here. I stayed at the edge of it, which the ditch passes fairly close to the east end of the ditch.

(578) (579)

Q Okay, so this lightened line represents a ditch of sorts?

A I imagine, yes, sir.

Q And you actually got into that ditch?

A No, sir. I stayed in the cane field by the ditch. I never exited the line where the cane field ended.

Q Your body was always on the edge of the cane field?

A Inside the cane field.

Q Put a little mark to the closest point that you came to the house.

A (Witness complies.)

BY MR. HALL: Let the record reflect that the witness placed a blue-colored mark on "Defense Exhibit Seven".

A There was a bicycle laying there, because it scared me.

(579)

Q A child's bicycle?

A No, it was a big bicycle.

Q So that was an area that these people lived, inhabited and used?

A I have no idea.

Q Well, certainly you don't throw bicycles in the cane field, do you?

A I don't.

Q Now, at the time that you were observing this house from the cane field or the ditch, wherever you were, you knew that these people were engaged in personal and private activity; correct?

BY MR. McHUGH: Objection, Your Honor. That calls for a conclusion on the part of the witness.

BY MR. HALL: No, I'm asking what he knew and he saw.

BY THE COURT: Well, I think you can say what he saw is what he knew, but it draws a conclusion.

BY MR. HALL: All right, I'll be glad to rephrase it.

Q You saw people engaged in a barbeque; correct?

(579) (583)

A Yes, sir.

Q You heard music and voices?

(583)

BY MR. McHUGH: Your Honor, I'm going to object. This calls for an opinion on the part of the witness.

BY MR. HALL: Well, he lives around here. He knows people do their truck-unloading and loading at night.

BY THE COURT: Well, I think what the witness perceived is important. The objection is overruled.

Q You live around here, don't you?

A Yes, sir.

Q And you know that during summer men load and unload trucks at night, because it's cooler; don't you?

A No, sir.

Q You don't know that? You've never seen that?

(583) (584)

A No, sir.

Q Did you ever see men do any physical work at night because it's cooler?

A Not for the simple reason it's hotter, no, sir. It's hotter during the day.

Q You just don't know.

A No, sir. I'm not aware of that.

Q But there are men working at night?

A Possibly could be, yes, sir.

Q And you've seen lots of men working at night at various (584) times. Sure. Sometimes men load and unload trucks at night, too, don't they?

A Yes, sir.

Q So that's not unusual at all.

A I can't compare it.

Q Okay, but the mere fact that people work on a truck at night doesn't mean anything, does it?

A Not by itself, no, sir.

Q Not by itself. Okay. So this

point you moved the surveillance closer, didn't you? Didn't you kind of come back in when you saw the men go back out toward the truck? Is that when you went off to the edge of the ditch?

A Just prior to that.

Q Just prior to that. It's at that point that you saw into the back of the eighteen-wheeler as they were beginning to unload the first small bobtail; correct?

A I don't think I caught the question. Go ahead.

Q All right. In the plan of surveillance, it was at that point that you first observed inside the eighteen-wheeler?

A Yes, sir.

Q Okay; and until then, you didn't know, other than being briefed that there would be marijuana in some way connected with that property that night, or your people expected that, you didn't know whether there was anything there or not; correct?

A Not definitely, no, sir.

Q All right. Now you looked in the

back of the truck (585) and you saw the bales; correct?

A Yes, sir.

Q Could you see that through the Starlite scope, or did you have to wait until you got your binoculars on before you could tell that?

A Well, you could see it was packaged, but you could not tell the color of the brown burlap through the night scope.

Q All you knew was that there was a packing material?

A Yes, sir.

Q Okay. So what you saw at that point were bales stacked in the back of the truck of a substance; correct?

A When I saw them, I thought of the only thing, bales of marijuana.

Q That's what came into your mind.

A Yes, sir.

Q Because you were there to see marijuana, weren't you? That's the only reason you were there.

(585) (586)

A If they wouldn't have told us to be looking for bales of marijuana, once I saw them that's what was in my mind.

Q I see. Okay. Now, sir, have you ever looked inside a lawyer's briefcase?

A A lawyer's briefcase?

Q Sure. Two or three times, haven't you?

A It looks like anybody else's briefcase.

Q Two or three times you've looked inside a lawyer's briefcase?

A Approximately.

Q Okay. You've looked inside Mr. McHugh's briefcase, (586) have you?

A I don't remember.

BY MR. HALL: Would you (Mr. McHugh) mind opening your briefcase and showing it to the witness?

BY MR. McHUGH: (Complies.) Let the record show that I've showed him.

Q Some books, right, and papers?

A Correct.

Q Exactly what you'd expect in a lawyer's briefcase.

A Yes, sir.

Q So if you saw that briefcase that you knew belonged to a lawyer, you'd expect papers and books; right?

A Yes, sir.

Q Now, this, sir, is a lawyer's briefcase. Tell me what's inside it.

A I have no idea. I can't see inside of it.

Q Well, that's true, because I told my brother to put something in it that I didn't know, either; so let's find out together, shall we? Money. That's good. I get to keep it. The point is it's not papers and books; correct?

A Yes, sir, if you say so.

Q Well, come and look for yourself. Satisfy yourself, but don't take the money. Okay?

A (Witness complies.)

Q Only currency; correct? Only three twenty-dollar bills; correct?

A Four.

Q Four?

BY MR. HALL: Judge, I object. My brother held out on me.

Q The point is, sir, there's no way you can see inside this briefcase; true?

A Correct.

Q Now, these bales that night were sealed, each one of them, correct?

A No, sir, not totally sealed.

Q Well, did you see marijuana?

A Bursting at the seams.

Q Bursting at the seams. Did you see inside the bales?

A You could see there was an opening, but you couldn't see what was inside the bales.

Q You couldn't identify anything inside it; you just saw that it may-

be was a little opened. Okay. Now, let's talk about the other things that sometimes help you identify what might have been in the bale. Was there an odor of marijuana?

A not from where I was.

Q You couldn't smell any, okay. Let's go to the next question. Did you see marijuana gleanings in the area?

A Not from where I was, I couldn't see.

(588)

Q So all you saw were bales?

A Yes, sir.

Q Now, you testified that you had seen bales like this two or three times in your experience -- actual eyeball live experience?

A Yes, sir.

Q Sir, in each of those two or three times, that was after the arrests had been made; correct?

A Yes, sir.

Q That was after there was a determination that the bales were filled

with marijuana and you were walked to those bales and it was said, "Here are bales of marijuana and we know there's marijuana in it," and you could see the marijuana around the area; true?

A Yes, sir.

Q And in each instance you could smell the marijuana; true?

A Yes, sir.

Q In each instance, you saw marijuana gleanings; true?

A Yes, sir.

Q And in each instance you knew in fact when you saw those bales that those bales had marijuana in them; correct?

A Yes, sir.

Q Now, in this case --- by the way, each one of those situations, there were two or three?

A Two or three. I don't remember.

Q But in both of those or all three of those situations they were in broad daylight; correct?

briefcase and I took the briefcase out of the courtroom for five minutes and came back in and said, "This is a lawyer's briefcase," would you in the most important of your personal affairs say, "It's a lawyer's briefcase. It's got books and papers in it," or would you say, "It's a briefcase. The contents I don't know"? Which would you do?

A I would guess that there were books and papers inside.

Q You'd guess. Exactly; and that's because at least two times now you've seen into this briefcase, you've seen into mine and maybe a few other briefcases from time to time, and you would guess based on the experience; but you wouldn't know and you wouldn't be reasonable; you'd just be guessing. True?

A Yes, sir, it'd be a guess.

Q All right; and the difference between you making a guess in that circumstance and you guessing on the night of June 15th was because you were told by your fellow officers that there would be marijuana involved in those trucks?

A We were looking for marijuana, yes, sir.

A Possibly, yes, sir.

Q How many of those officers were around the vicinity, do you know?

A No, sir.

Q Was it at least five?

A I'd be guessing.

BY MR. KLEPPNER: I don't have any other questions, Your Honor.

BY MR. VIDRINE:

Q Officer Lejeune, I think you testified that when you first began your surveillance, you were conducting a rolling surveillance; is that correct?

A Yes, sir.

Q This began approximately what time of the afternoon?

A 2:30, 3:00. That's when I got there.

Q How long did you maintain the rolling survey?

Q And that was the difference. Thank you.

BY MR. HALL: No further questions.

BY MR. KLEPPNER:

Q Officer Lejeune, were you present the night of the (591) arrest itself? Were you there when the defendants were arrested?

A Other officers made the actual arrests. I was in close proximity. I was standing alongside the fence when they were arrested.

Q Now, did you find any rollers in those trucks?

A Rollers?

Q Yes.

A The rollers were stacked in the refrigerated van.

Q They were way at the front, weren't they?

A Yes, sir.

Q They were stacked at the very top of the material, weren't they?

A Yes, sir.

Q Now, there were other police officers stationed in and about the property that was under surveillance the night that you made the arrests, weren't there?

A I didn't make the arrests.

Q Well, the night that you made your surveillance activities.

A We had men scattered all over, yes, sir.

Q They were positioned at various points up and down the road, weren't they?

A Yes, sir.

Q And their purpose, I assume then, was to make a stop of any vehicles that were leaving; is that right?

A Not necessarily.

Q Were they to follow those vehicles?

A If that's what the sergeant ordered, yes, sir.

Q And if a stop were necessary, they were right in a (592) position to accomplish it, weren't they?

(592) (593)

A Until just prior to being put on foot.

Q So this was approximately at dusk?

A After.

Q During the summer it gets dark approximately around 8:00 or something like that?

A Yes, sir.

Q All right. During the course of your rolling survey or surveillance, how many times do you estimate that you passed on the parish road and on 349?

(593)

A Eight to twelve.

Q Okay. So this was every twenty minutes or so you were going by, given a four hour period?

A Periodically.

Q Or approximately every half hour or something like that?

A Yes, sir.

Q That would be a reasonable estimation?

A Yes, sir.

Q As you made your rolling surveillance, did you examine the property carefully each time you went by the surrounding area, the general area?

A Yes, sir.

Q I think you testified that when you entered the canefield when you were put on foot, as you said, you came in from the south? Is that what you said?

A Well, I was put on foot on the east side and walked around to the south side.

Q You walked around from the east. You were let off on what? The parish blacktop, or on 349?

A The parish blacktop.

Q Then you walked around to the south? Why didn't you just come in from the opposite side, from the state road?

A Too many houses in the area. I didn't want to be let down there.

Q While you were making your surveillance, walking around, driving, whatever, did you ever notice there was fencing on the other side?

A The other side of what?

Q On the other side of the property next to the state highway.

A Yes, sir.

Q You did? What was growing in the field at that time?

A Sugarcane.

Q About how high was the sugarcane at this time, would you estimate?

A About three foot.

Q About three feet? Did you notice any cows, horses, pigs or anything around the neighborhood?

A No, sir.

Q Do you think the fence was there to keep animals out?

A That's what the fences are for.

Q Does it also signify property lines and boundaries? Did you ever consider it might signify private property?

A Possibly.

Q And, also, to keep people out?

(594) (595)

A Possibly.

Q Officer Lejeune, I'd like to show to you "Defendants' Exhibit Sixteen". The fencing I was questioning you about is this fencing here. Do you recall this along this highway?

A I remember a board being there, yes, sir, a fence line, a gate somewhere around right here.

Q The fencing stops approximately right at this point next to the drive?

A Yes, sir, right next to the roadway. I wouldn't consider it a driveway.

Q In the shell roadway?

(595)

A Yes, sir.

Q About where?

A I don't think

Q Are you sure that you didn't come into the cane field from this side?

A Yes, sir.

Q You're positive?

A Yes, sir.

Q Because of the fence?

A Too many houses in the area.

Q How many houses are in that area? Do you recall?

A On the opposite side of La. 349 there's a number of them along that little curve right there, if I remember right.

Q One more question concerning the line. Do you recall what the southern boundary was?

A The southern boundary?

Q Yes, sir.

A If I remember right, it was a gulley with a fence.

Q Would it be a drainage ditch?

A Possibly.

Q It wasn't a little furrow which indicated a place where sugarcane grew?

A Not to my recollection.

(595) (607)

Q Do you recall how deep the ditch was?

A I didn't get in the ditch.

Q You were always within the property lines of the ditch?

A Yes, sir. I was always to the north of the ditch.

Q Officer Lejeune, I show you "Defendants' Exhibit Seven". Do you see the trailer?

(607)

A Yes, sir.

Q Where was the bicycle?

A At the edge of the cane.

Q Referring to "Defendants' Exhibit Eight" in evidence, where was the bicycle?

A Somewhere along right here.

Q That's where you were?

A Yes, sir. Well I come from down in here to the edge of the cane.

Q Put an "X" on that photograph where where the bicycle was and

and a "Y" where you were.

A You want an "X" for the bike.

Q Yes, sir. Well, put a "B" for "bike".

A (Witness complies.)

Q It was laying on the side; correct?

A Yes, sir, laying on the side.

Q And you were standing right next to it?

A Well, I came out a couple rows of sugarcane down approximately here, because I was in direct line of the barbeque pit.

Q What you did is you snuck up in that cane field near the bike and looked into the house; correct?

A No, sir. I couldn't see into the house. I was trying to hear what they were saying.

Q You were trying to hear what they were saying?

A Yes, sir.

BY MR. McHUGH: Let the record reflect that he put a "B" where the bike was and an "X".

BY MR. HALL: Your Honor, just so we (608) can see that ditch clearly for relative circumstances, we offer "Exhibit 20".

Q At that time, you were crouched and you were trying to conceal yourself, weren't you?

A I was laying flat between the furrows, yes, sir.

Q Flat on your fact with your head up?

A Yes, sir.

Q Now, while you were out in the fields, were you standing straight up, or were you trying to conceal yourself?

A Trying to conceal myself.

Q Never standing straight up?

A Once in awhile to get the blood circulating again.

(608) (633)

Q Well, why did Mr. Wade say yesterday that you were always standing up?

A I don't know why he said that.

Q It's not true, is it?

A I have no idea. I was crouched down a lot, laying down.

Q Thank you.

BY MR. HALL: No further questions.

(Witness excused.)

R E C E S S

(633) (633)

Q So what did you do?

A So I agreed to it. I said, "Okay, we can get a warrant; but if it comes to a point that they start moving, I'm going to hit them;" so we both agreed to get a telephonic warrant at the time.

I went back. I went into the door. I woke up Mrs. Hebert and asked her to use the phone. She allowed us in. I took the 400 Customs radio portable and brought it inside the house. Rick called Judge Magistrate in Abbeville, Mr. Hebert, I believe....

Q During this time, who had the radio?

A I did.

Q Did you receive any more communications over the radio from the surveillance?

A Yes, sir, I did. While Rick was on the telephone obtaining a telephonic search warrant or attempting to obtain a telephone search warrant, Wade came on the air and told me that they had moved the other bobtail truck to the eighteen-wheeler and that he could hear the same noise -- bales being put on the conveyor belt; and he corrected himself and said, "They're not offloading from the eighteen-wheeler into the small truck; what they're doing is taking from the smaller trucks and putting into the eighteen-wheeler."

Q At this time, was any action taken?

A I told Rick at that time --- I

said, "What is the status on the telephone warrant. I'm going to hit it

(638)

that there would be marijuana there or involved with that residence or those trucks that day; correct?

A We felt there was going to be something happening.

Q Right. At that point, you took the three teams and you set them up for roadside surveillance; correct?

A Yes, sir.

Q And you took your drive by yourself?

A Yes, sir.

Q And that's when you saw the eighteen-wheeler personally?

A I saw it personally?

Q Yeah.

A Yes, sir.

Q Now, so that we're clear, this is somewhere around 2:30 in the afternoon; correct?

(638) (639)

A No, sir. I was advised at 2:30 that the eighteen-wheeler and the two trucks were there. I didn't see it personally until about 5:30 that afternoon.

Q Excuse me, I'm sorry. Now, when you saw the eighteen-wheeler and the two trucks there and all this information, one other fact occurred, too -- you heard the refrigerator part of that trailer working, didn't you?

A Yes, sir.

Q And you said, "That tells me something." That tells me what? What did it tell you?

A It told me that was one kind of way of transporting marijuana.

Q Is it a common way of transporting other vegetable (639) matter?

A. Yes, sir.

Q Is it a common way of transporting animal livestock that's dead?

A Yes, sir.

Q As a matter of fact, it's a common way of transporting any spoilable matter in this country?

A Yes, sir.

Q Now, so that we're clear about it, this particular truck had been registered to Zerbe & Sons; isn't that what you said?

A Yes, sir.

Q Zerbe & Sons is a trucking firm, isn't it?

A I believe so, sir.

Q So it wouldn't be unusual for Zerbe & Sons to have a trailer, in other words, rented to transport marble, copper, perishable items, whatever they might be; correct?

A Partly correct.

Q But notwithstanding all of that, you felt that that told you that marijuana was going to be there and to tighten up the surveillance?

A Yes, sir.

Q So you discounted all other lawful activities in your own mind and you said, "We are going to have marijuana here," true?

A Yes, sir.

(639) (640)

Q Okay. And in order to make sure there was no chance of losing this case, there was no chance of escape, you set up the people at the scene in (640) such a way that all exits from the property were blocked; correct?

A Yes, sir; not blocked.

Q Observed?

A Where if they departed there, we could follow in on moving surveillance.

Q You had a choice, actually. You could either fall in or arrest them. Correct? You could either follow them in surveillance or stop the movement? Isn't that correct? That would have been your choice?

A Yes, sir.

Q So what is certain is that from that point forward, escape was impossible, reasonably impossible with the marijuana; you had the trucks, for sure?

A Yes, sir; but at that time, we didn't know the trucks contained marijuana.

Q I see. Now, this is around 5:00 in the evening and you thought things

were getting pretty good. Now, did you call up Mr. McHugh or any member of his office, saying "We've got an investigation going and we think it's going to break. Be available to help me get a search warrant"?

A No, sir.

Q Did any member of your team call Mr. McHugh or any member of the District Attorney's office to advise them of that?

A Not to my knowledge.

Q Did any member of your team call His Honor or any other judge to make arrangements for avilability

to get a warrant, if a warrant was needed?

A No, sir.

Q But you could have done all that?

A Yeah; but at that time, we still didn't know if they had marijuana...

Q Well, I appreciate that -- your being cautious and prudent and conservative. It wouldn't have been unreasonable or even unrealistic for you to say "Judge, if something happens, are you going to be home tonight?" That wouldn't have been bad, would it?

A It's not a common practice, because we didn't have anything prior to when it occurred.

Q All right. So at that point, at least, you didn't think you had anything worth considering or bothering either Mr. McHugh or a judge about; correct?

A Correct.

Q Okay. So now you set up the surveillance teams and you have the two men in the field; correct?

A Yes, sir.

Q Did you bother to check out whether the field that you put them in was Mr.

(641) (642)

Dupuis' residence, that's his home, that's his field?

A It's just a field next to the residence. At the time, I didn't know who owned it.

Q Did you care?

A At the time?

Q Yeah.

A No, sir.

(642) (642)

Q Did you tell the people --- did you give them any instructions on how to perform the surveillance -- that is, "Don't look into private areas. Don't invade their privacy"?

A No, sir, I didn't have to, because I felt both agents were -- had been working narcotics long enough to know what they could and could not do.

Q Now, so that we understand narcotics agents, isn't it true that narcotics is unique among law enforcement officers and that's it so highly competitive amongst the various agencies involved?

A Competitive between agents?

Q Sure. Sure.

A No, sir, I don't --- not myself, personally.

Q No, but you're aware of that?

A It may be.

Q It may be, or you're aware of it? You've complained before about the fact that the D.E.A. or Customs wasn't cooperative and they were trying to make their own case and not helping you all out? You know that.

A Sir, I work with all the agencies very well.

Q That's you. You've never heard that problem?

A No, sir. I'm sure other agencies might have difficulties; myself, personally, I don't.

Q That's unique to you, because you are an easy guy to work with.

A Could be.

Q Now, at 11:00 at night you got the first radio transmission saying the refrigerator unit was

A State Police narcotics agent.

Q How long have you been a narcotics agent?

A Five years.

Q In connection with narcotics agents, have you received any training; and, if so, what?

A I went through one week of basic narcotic training in the State Police Academy, two weeks in D.E.A. Academy, and two other weeks in the D.E.A. Academy.

BY MR. HALL: Same objection.

BY THE COURT: Just for the record, it'll be made general, and your objection to my ruling is again noted.

Q On the 15th of June, 1978, did you have occasion to go to the residence of Jeff Dupuis?

A Yes, sir.

Q In that vicinity?

A Yes, sir.

Q Where is that located?

(647) (648)

A On La. 349 in St. Martin Parish.

Q Had you been there on prior occasions?

A No, sir.

Q What was the purpose of you going there on the 15th?

A To pull surveillance.

Q Under whose direction were you?

A Sgt. Trahan.

Q What type of surveillance did you pull?

(648) (648)

A Rolling surveillance and stationary surveillance.

Q How long did this continue?

A Through the afternoon and evening.

Q Could you describe to the Court any vehicles that you saw at the Dupuis residence at the time you started your surveillance?

A The eighteen-wheeler and two bobtail trucks.

Q Where were they situated?

A On the shell road which runs between --- on the south side of the Dupuis residence, back and on the east side to the parish road --- the black-top road.

Q How long did you maintain this surveillance?

A Well, off and on all afternoon.

Q Did you maintain contact with anyone during this time?

A Radio contact.

Q With who?

A With the rest of the vehicles.

Q Who was in charge of this operation?

A Sgt. Trahan was in charge of us.

Q Did you have anyone else with you besides the State Police?

A Yeah, we had U.S. Customs.

Q Did you have occasion after nightfall to go to the Hungry Hobo?

A Yes, sir.

Q Why did you go there?

(648) (654)

A To meet for plans for the execution of the warrant.

Q What were your instructions?

(654) (654)

Q A few times. You had passed it on other days; is that right?

A Yes, sir.

Q And had you generally seen other cars around that residence?

A I've seen a couple there.

Q A couple of cars. How about trucks? Had you seen trucks around there?

A No, sir.

Q You never saw trucks. Ever saw a trailer around there?

A There was a trailer at one time.

Q A trailer at one other time. So this was not anything unusual; is that right?

A Not really.

Q Now, you stated that you placed somebody under arrest when you got there; is that right?

(648) (668)

A Yes, sir.

Q That was the first official act you performed when you arrived; is that right?

A Yes, sir.

Q What did you arrest him for?

A Possession.

Q Of what?

A With intent of distribution of marijuana.

Q Did you find any marijuana on him?

A Not on him, no, sir.

Q Had you searched the trucks yet?

A No, sir.

Q But you arrested him?

(668) (668)

Q On the 15th, I believe you said, you were in the vicinity of the Dupuis residence in Henderson?

A Yes, sir, I was.

Q Under whose instruction were you?

A Sgt. Trahan.

Q And what were you conducting at that time?

A I was conducting a surveillance on the residence of Jeff Dupuis, mainly observing three trucks parked to the rear of his residence. I was to follow these trucks if they moved in any way.

Q Did you have an occasion later that evening to meet anyone at the Hungry Hobo?

A Yes, sir, I did.

Q Who did you meet there?

A I met with Sgt. Trahan about --- a little after 12:00 a.m.

Q Were you given any instructions?

A Yes, sir, I was.

Q What were those instructions?

A At that particular meeting, Sgt. Trahan advised us that they had obtained a telephonic search warrant, that I was assigned with Trooper Theriot to conduct a search of the premises of Jeff Dupuis.

Q And at this point, what did you do?

(668) (669)

A At this point, myself and Trooper Theriot proceeded on the parish road, which is located on the north side of the Dupuis residence, and we stood by momentarily waiting a word from Sgt. Trahan to proceed in and execute the warrant.

Q How long after that did you receive the order from

(669) (669)

Trooper Trahan?

A For a period of about two minutes we waited on instructions to go ahead in.

Q And what did you do?

A We drove down the parish road, made a left turn into the circular driveway, which goes behind the Jeff Dupuis residence. I drove my unit to a position adjacent to a tractor-trailer rig which was parked there with a smaller 20-foot bed GMC truck backed up to it.

Q Once you got there, what action did you take?

A Myself and Trooper Theriot disembarked from our vehicles and proceeded towards the trucks. As I was moving out, I hollered, "This is the State Police; everybody freeze."

(669) (686)

I then observed Trooper Theriot running on the opposite side of the truck. He was chasing a subject and I followed him for a short distance and then I stopped realizing there was no other suspects in that particular area.

I backtracked and went around the truck. And as I approached the tractor-trailer rig which was backed up next end-to-end to this 20-foot-bed enclosed-carrying GMC, I had a headlamp on my head. As I shined it in, I observed six white males standing in the rear of this cargo carrying truck. I also observed bales of suspecting marijuana in the rear of the truck of the smaller truck and the rear of the 18-wheeler of the tractor-trailer rig was

(686) (686)

Q What were the lighting conditions on the other instances?

A All of the arrests with the exception of the ones in Beauregard were conducted at night.

Q No, sir. When you were handling these bales so that you could recognize what a bale of marijuana looked like, what were the lighting conditions?

A It was broad daylight.

Q Trooper Lamaire, when you went upon that property, did you go upon the property pursuant to a search warrant that you understood was issued?

A Yes, sir.

Q When you came upon the property, what trucks did you see?

A I saw the tractor-trailer rig, which is --- and there was two what-we-call bobtails or 20-foot bed cargo carrying trucks.

Q When you came upon the property did you open and look inside the cab of those trucks to see if there was anybody there at any time during ---

A Not until after I had effected the arrests of the six defendants.

Q But you did look?

A Yes, sir, I did at a later time.

Q Did you find anybody there?

A Not inside the trucks---in the cab of the truck, no, sir.

Q Did you find any keys in the cabs?

A I didn't look for any keys.

(686) (687)

Q Did you find any keys?

(687) (687)

A No, sir, I didn't.

Q Were the lights on?

A Inside the cab, yes, sir.

Q Inside the cab?

A Inside the cab, yes, sir.

Q But not the headlights on the trucks?

A I don't know if there were any headlights on the trucks.

Q None at all? You mean the trucks could not run at night?

A There were headlights on it, but they weren't lit.

Q Thank you. Were the engines running?

A No, sir, they weren't.

Q Was there any appearance at all that those trucks were going to move out?

A Not at that time, no, sir.

BY MR. HALL: No further questions.

One more question, excuse me.

VOL. IV

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2045

JEFF H. DUPUIS, BERNIS H. DAVISON
JOHN ZERBE and WILBUR L. SMITH

Petitioners

VERSUS

STATE OF LOUISIANA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

GRISBAUM & KLEPPNER
FERDINAND J. KLEPPNER
Professional Building
3224 North Turnbull Drive
Metairie, Louisiana 70002

ATTORNEYS FOR PETITIONERS

(687) (688)

Q Trooper Lamaire, who called Mr. McHugh-- Mr. Butch McHugh?

A I have no idea.

Q When did he arrive at the scene?

A It was some time after the arrests were actually effected.

Q How long after the arrests?

A I don't recall. I was busy with the defendants.

Q Yes, sir. But it was still while you were processing the arrests?

A Yes, sir. He came in, I was still, you know, taking

(688) (688)

care of making the arrests.

Q Would you say within the half-hour?

A I couldn't really say.

Q Within an hour?

A Probably within an hour.

Q For sure within an hour?

A Not for sure.

Q I understand.

A I wasn't paying any attention to Mr. McHugh.

Q But he was there?

A I did see him, yes, sir, that night.

BY MR. HALL: Thank you.

BY MR. KLEPPNER:

Q Trooper Lamaire, when you turned into that circular driveway at the Dupuis residence, did you see the boat parked near any of those trucks?

A There was a small speed hull type of --

Q On a trailer?

A Yes, sir.

Q So, it was right there by the trucks, too, wasn't it?

A It wasn't far from it.

Q In the same general vicinity of that driveway, right?

A Yes, sir.

Q And you did state previously didn't

you, that you had passed the residence a number of times during the day; is that right?

A Yes, sir.

Q On those occasions you saw more vehicles than just those trucks, didn't you?

A Yes, sir.

Q Cars around the place?

A There was some cars in the driveway.

Q Was a boat there?

A There's a boat in the backyard.

Q Near the trucks, wasn't it?

A Yes, sir.

Q How many cars did you see?

A I don't recall. They kept coming and going various times during the day.

Q So, it was a general pattern of movement; is that correct?

A Yes, sir.

(689) (690)

Q Had you ever passed that residence on any other day before the 15th of June?

A I don't recall if I drove by it. I passed over it in a helicopter on a few times.

Q On those occasions did you see vehicles parked in the vicinity coming and going?

A There were cars at the residence, yes, sir.

Q Did you ever see any trucks there?

A The first time I saw trucks was the evening that I was assigned to work the surveillance.

Q That was the 15th?

A Yes, sir.

Q You had never seen trucks before there?

A No, sir.

(690) (690)

Q How many times did you pass over that residence in a helicopter before that day?

A Probably two times.

Q Now, on the times that you passed the residence on the 15th and you saw the trucks and the boats and all out in the driveway, did you see any bales?

A No, sir.

Q Immediately when you drove into the driveway to make the arrest, did you see any bales?

A No, sir.

Q When you walked up to the trucks, or at least when you attempted to chase down one of the suspects or assist the trooper chasing him down, did you see any bales?

A When I approached the truck, yes, sir, I saw bales.

Q At what point were you standing when you saw those bales?

A I was standing right at the rear of both vehicles looking at the defendants.

Q As a matter of fact in order to get a view--good view of the bales, you had to move the trucks, didn't you?

A No, sir. I got a good view when I stuck my head in there.

(690) (745)

Q You got a good view when you stuck your head in there?

A Yes, sir.

BY MR. KLEPPNER: I don't have any other question.

(745) (745)

REASONS FOR JUDGMENT

BY THE COURT:

Evidence on the Motion to Suppress Evidence has been taken. Counsel have argued and the Court will now render its judgment and the reasons for it.

I think first of all I should discuss the federal warrant issued by Magistrate Hebert. The State abandoned any reliance it may have had on that warrant. So, it is really unnecessary for this Court to comment on it, except for two things which I feel warrant comment.

First of all for the record and so there is no question about it, the Court will rule that the warrant is invalid and consider any and all arrests, searches and seizures in this matter as having been made without a warrant. I think in view of the State's position I don't have to

(745) (746)

give any further reason for that ruling.

The second comment I want to make has to do with the strong urging by defense counsel that Agent Joachim intended to falsify and perpetrate a fraud upon both Magistrate Hebert and this Court or deceive either of us. I'm frankly suprised at the argument, as I want to comment for the record that I didn't receive his testimony that way at all, nor do I view his disclosures to Magistrate Hebert in support of the warrant in that way.

Both these men, the magistrate and the agent, were dealing at the time with a new and novel legal device and it was the first experience for each.

(746) (746)

One was acting in the excitement over the event in apparent need for haste and the other was awakened from slumber in the middle of the night. Neither were at their best. But I think both and not only the agent were responsible for the quality of their produce.

Mr. Joachim admitted errors in his disclosures. He admitted he assumed certain things. But this Court doesn't question the good faith that

he had in making those disclosures.

And while I do find a variance between the tape and the transcription of it, I find the variance rather insignificant. The tape is of poor quality. It is hard to hear. I find no evidence of an intent to distort anything in there.

Finally, in answer to Mr. Hall's question in rebuttal argument as to Joachim's veracity in which Mr. Hall asked how could Mr. Joachim think all the trucks were empty, then tell Magistrate Hebert that the truck had gotten the marijuana off of this plane, I find that question easy to answer.

He had learned or at least he had obtained information that the trucks contained a cargo by the time he spoke to Magistrate Hebert. Initially he was operating under a different assumption according to his own testimony. Well, enough of that.

The warrant will have no place in these proceedings, anyway.

Let me comment briefly about the use of hearsay evidence in probable cause determinations. While

this question wasn't addressed very much in argument, there are objections in the record to the admissibility of this type of evidence. So, it's necessary, I think, that I comment.

The test for determining probable cause for an arrest, search and seizure without a warrant is the same as that for a warrant. The jurisprudence is legion that this can be based entirely on hearsay evidence as long as the information provided must set forth underlying circumstances and details to provide a substantial, factual basis on which to find it reliable. I cite STATE V. HYSELL, a Louisiana Supreme Court case decided on November 20 of this year bearing Docket Number 62,152 of that court. I don't have any other citation. MATLOCK VS. UNITED STATES, 41 U.S. 164; U.S. VS. LEE, Fifth Circuit, 541 Federal 2nd 1145 and DRAPER VS. U.S., 79 Supreme Court, Page 329.

Before the Court can determine whether that hearsay evidence is based on information setting forth the underlying circumstances and details to provide a substantial factual basis on which to find it reliable, you first of all have to listen to the evidence. That is why I allowed the hearsay evidence on this question, but on this question alone, and I am confident that my ruling is correct.

(747) (748)

Moving on to the issue that has to be decided, it is going to be basically in three parts. The first involves the question of privacy and whether

(748) (748)

there was an invasion thereof. The second involves probable cause and the third exigent circumstances. This is a difficult area of the law to work in. As all counsel know, there are many decisions. There are apparent conflicts in the jurisprudence. There is no test that can be applied to every factual situation. Because of these things and because we have a unique factual situation in this case that really isn't duplicated that I can find in the jurisprudence, State or Federal. I have considered all authorities which were brought to my attention by all counsel and I have done independant research of my own to try to resolve this issue properly.

So that there won't be any suspects, let me announce at this time that I'm going to deny the Motion to Suppress. I'll now say why.

The Fourth Amendment to the United States Constitution protects people not places. KATZ VS U.S., 389 U.S. 347: society values the individual's

(748) (749)

reasonable expectation of privacy. And so that is what the Constitution protects. STATE VS. HINES & MURRAY, 323 So.2nd, 449; U.S. VS. SANTANA, 96 Supreme Court 2406. The Constitution of Louisiana provides the same protection and in fact as suggested by counsel is somewhat more generous than the Federal Constitution in its extension of protection of privacy. However, the principles that I just announced apply in both.

In HESTER VS. UNITED STATES, 44 Supreme Court at Page 445 in the case where officers concealed

(749) (749)

themselves apparently on the property of either the defendant or his father and observed activities which lead to a search and seizure from about 50 to 100 yards away, when they had no warrant for a search or an arrest. United States Supreme Court held that there was no invasion of privacy and used this language: "Apart from the justification, the special proctection accorded by the Fourth Amendment to the people in their persons, houses, papers and effects is not extended to the open fields."

Now, that is an old case, but it was cited with approval in UNITED STATES VS. SANTANA, which I've referred to

(749) (750)

before, and by Justice Douglas in delivering the opinion in AIR POLLUTION VARIANCE BOARD VS. WESTERN ALFALFA, 40 Edition, Page 607. It is a doctrine well ingrained in our law. It is still very viable.

For further reference to it, I cite UNITED STATES VS. BROWN, Fifth Circuit decision, 473 Federal 2nd at Page 952 and the cases cited therein.

Also, in UNITED STATES VS. HOLLON, another Fifth Circuit case, 420 Federal 2nd at Page 301, the Court used the language: "No search warrant was required for a search in open fields, constituting neither the house of the defendant nor the enclosure surrounding it."

Now, there is another doctrine called the "plain view" and it traditionally involves an inadvertent finding, which we don't have here, and this decision is not based on that doctrine. But

(750) (750)

there is a couple of cases that have thrown an interesting twist to it. WALKER VS. BETO, 437, Federal 2nd, 1017, the Fifth Circuit Court decided a case which involved a deliberate, not inadvertent, look through a car window at night with a flashlight

for purposes of inspecting inside very deliberately. The Court said that "The plain view rule does not go into hibernation at sunset in holding that the aid of a flashlight did not transform a nighttime observation into a search." Our Supreme Court of Louisiana in STATE VS. JONES, 267, Southern 2nd at Page 559 held the same thing. While the plain view rule does not apply, I think this language is very interesting from considering the fact situation presented in our case.

Now, the defense has suggested authority to the Court on this subject and I have considered it. And it is difficult to make the authorities on both sides reconcile in some instances. So that presents to the Court the problem of distinguishing and I find that the defendants' authorities are more easily distinguishable.

The defense cites for instance STATE VS. BYERS, 359 Southern 2nd, Page 84. And although the Court in that case held that there was an invasion of privacy, it seems to this Court that that decision supports the State's position in the instant case more than it does the defense's position. And that's because of the reason the

Court held that there was an invasion of privacy in that case, the property was clearly posted against trespass. There were signs which said "Private Road", "Don't Enter", "No Trespassing", "No Hunting", "No Fishing" placed at various places. The road on which there were signs saying "Private Road", "Don't Enter" had a chain across it supported by two rods on either side of the road. None of the activities involved could be seen from outside of the property. The Court held that under those circumstances the public was reasonably alerted that an intrusion on the land was banned by the owner and thus, there was a legitimate expectancy of privacy.

The Court distinguished, and I think quite properly, the HESTER and AIR POLLUTION cases, saying that, "There was no evidence that specific steps had been taken in Hester and Air Pollution to exclude the public from the areas searched." The specific steps obviously discussed are the signs, the chain across the road, et cetera. Likewise, those specific steps are absent in the instant case.

Likewise, the defense compares the facts of this case, the instant case, to UNITED STATES VS. KATZ, which I have cited above or earlier, in which an electronic hearing device was

(751) (752)

placed on a public telephone booth with the view of listening to the conversation by the suspect inside. United Supreme Court ruled that the defendant in (752) such a closed booth had a reasonable expectation from invasion of his hearing privacy, because a booth--a telephone booth with doors to close like that is designed for such protection, because people want to have private telephone conversations certainly in some instances.

Now, I think the thrust of the defense argument is to compare that situation to the defendants in the two trucks back to back, that they had an expectation of privacy in the manner in which they put those trucks together, although it might have been otherise visible in an open area. Still, that gave them that expectation. But the invasion of privacy really came when you consider that situation when the trucks were moved apart in an otherwise unprotected area exposing the view inside not only to the special equipment but the evidence indicates at least for a brief period to the naked eye. That to me would be like voluntarily opening the door to the telephone booth and complaining that a passerby heard the conversation. So, the argument is valid.

(752) (753)

It becomes invalid when the defendants voluntarily gave up what they designed to protect their privacy.

An interesting case is STATE V. FEARN, -- and again, I think the defense called this to my attention -- 345 Southern 2nd, 468. And that Court held that that was an invasion of privacy. But I (753) think and I'm not sure that the invasion of privacy referred to the seizure of the plants, not the observation of them, because otherwise that case would be indirectly conflicting with a lot of the rest of the jurisprudence. I think, also, that case stands for the proposition that there was a probable cause to seize, but there was no exigent circumstances, so that the officer should have obtained a warrant, which he didn't. I feel that is the basis for that decision.

UNITED STATES VS. KIM involved a home, which is distinguishable because that is a specific Constitutional protected area.

STATE VS. LEMARTINAU,362 Southern 2nd, 526 was the cubicle case. But there, the defendant rented a cubicle which could be locked and protected. Certainly there was a reasonable expectation of privacy. It can be distinguished from this case.

(753) (754)

STATE VS. PARKER, 355 Southern 2nd at Page 900 involved a parked car. There was nobody around. There was no exigent circumstances. That wasn't the case here. The trucks were attended. They had in fact been moved and could at any time have been moved again. Although there were no keys in the ignition, they had just been moved. So obviously, the people with the keys were in the immediate area.

I find then that those cases are distinguishable in that manner.

(754) (754)

In the instant case, the photographs show very well that the defendant Dupuis' home in a sense is akin to what we think of in our country as a traditional castle that a man owns; his home is his castle. The residence and its environs enclosed most part by a fence and a line of trees. Its boundaries are further buttressed by the public roads on two sides and a private shell road or drive on the other two sides. Beyond that there is nothing to suggest a linkage to that home. And by the home, I talk about the residence in its environs. There is nothing to suggest common ownership of property beyond those environs. Beyond the shell road or

(754) (755)

drive a sugar cane field on one side which extended far to the east and then to the north. On the other side is an open pasture--like area on one end of which sits another separate residence, a mobile home.

It can be persuasively argued that the intent of the Constitution is to protect Mr. Dupuis' privacy in this home enclosure and that society indeed has an interest in doing this. This suggestion that the Constitution intends to extend this protection into the open areas beyond this falls on far less attentive ears.

The officers had to cross no fences. They were confronted by no signs, gates, et cetera, nothing to indicate to them whose property they were on. There's no trespass under the laws of this state. They had a legal right to be where they were and they did not violate Mr. Dupuis' recognized right to the privacy (755) of his home.

The fact that there is no boundary delineation on the east line of the porperty, a fence existing only on the highway side, no gates where the drives or roads were, no "Keep Out" or posted signs indicate to this Court that Mr. Dupuis, himself, did not reasonably expect to be accorded privacy there.

(755) (756)

The argument that the fence on the highway side signified to people that they should keep off of the property there infers that the lack of fences elsewhere has an invitation for persons to come on the property there if they wanted to.

It would seem to me that this is the classic case for application of the open fields doctrine, because this Court finds that Mr. Dupuis and other defendants had no reason to reasonably expect privacy in the place and the situation that they were in.

Moving now to the other issues in determining whether a warrantless arrest, search or seizure were valid in this case. Two questions as I said before have to be answered. The first is probable cause and the second is exigent circumstances.

These rules are well established. CARDWELL VS. LEWIS is 94 Supreme Court 2464. COOLIDGE VS. NEW HAMPSHIRE, 91 Supreme Court 2022.

The fact that there is no consistent test to apply to every fact situtation is well recognized.

UNITED STATES VS. FARNKOFF, 25 Federal 2nd, (756) 661; UNITED STATES VS. MITCHELL, 525, Federal 2nd, 1275, Fifth Circuit; STATE VS.

THOMAS, 93 Supreme Court 2000.

The test for an arrest, a search and a seizure are these: If an arrest without a warrant is to support an incidental search, it must be made with probable cause which exists if the facts and the circumstances known to the officer warrant a prudent man in believing an offense has been committed and that the person arrested committed it. HENRY VS. UNITED STATES, 361, U.S. 98; STATE VS. GORDON, 331, Southern 2nd, 262; STATE VS. MARKS, 337, Southern 2nd, 1177.

Louisiana Code of Criminal Procedure, Article 213: To support a search and seizure there must be probable cause to believe that the things sought to be searched for and seized has either been the subject of a theft or is intended for use or has been used as a means of committing an offense or may constitute evidence tending to prove the commission of a crime.

Louisiana Code of Criminal Procedure, Articles 161 and 162 and the cases cited previously: For that search and seizure to be accomplished without a warrant, then exigent circumstances must exist; that is, it must be impractical to obtain a warrant in that the opportunity to search is fleeting.

(756) (757)

STATE VS. WILLIAMS, 347, Southern 2nd, 231; STATE VS. GUZMAN, 362, Southern 2nd, 744; STATE VS. (757) HEARN, 340, Southern 2nd, 1365; CHAMBERS VS. MARONY, 90 Supreme Court, Page 1976. That's the page. Let's see how those legal tests apply to the facts of this case.

Agent Joachim had information, regardless of its accuracy, of a connection between Zylstra, Zerbe and Dupuis and that they were involved in illegal drug operations. This information was communicated to the other officers involved. Zerbe's tractor-trailer was near Dupuis' residence.

The agents had information that the tractor-trailer had left the premises and returned on June 15 with two bobtail trucks on or about June 15 with two bobtail turcks under the impression that the vehicles would leave to go pick up a shipment of marijuana. The agents prepared to be ready when the vehicles left, so that they could be followed and accordingly a surveillance was put up.

The first inkling that the marijuana was already there was when the officers or at least one of them heard the refrigerator unit running in the trailer or van. Of course, it's only an inkling. The possibility exists, of course, that the truck is just

being cooled off in anticipation of taking on a shipment later. The van was being cooled off, rather.

There, of course, is nothing out of the ordinary about having a barbeque and nothing suspicious about turning the light off when it is over. But it becomes suspicious when activity continues (758) in the darkness afterward. It is also suspicious when the lights go off soon after a vehicle arrives at that hour. The refrigerator unit went off at the same time that a person or persons went up to that vehicle. It could be a coincidence, but I suggest it is an odd incident and it focuses attention to the activity around the vehicle.

Next, the engines on two of the vehicles were ignited and movement begins. The evidence is that as the vehicles neared each other -- that is the bobtail getting back to back with the tractor-trailer--the officers are able to see bales in the van or trailer. Obviously, they cannot know with certainty that those bales contain marijuana, but they were packaged like they had seen marijuana packaged in their experience and they were squared. By that, I mean not rounded like grain or feed or anything else like that would appear when baled or for that matter like anything

(758) (759)

else that the officers were then aware of or knew of. For the first time then the officers realized that marijuana in their opinion at least was already there and that the vehicles might not be going to obtain a shipment.

They heard loading operations going on. An observer, as suggested, might consider the possibility that the men inside were engaged in lawful labor at that time as a means of avoiding the heat of the day by toiling in the cool of the night. But I suggest that the reasonable observer (759) who saw such activity commence at 11:30 p.m. or thereabouts in total darkness except for a light inside the interior of the bobtail truck in a rural area not usually associated with truck loading operations would discount such possibility quickly and be very apprehensive about the legality of such a clandestine operation. Any doubt if the operation was to be conducted under cover of darkness as to why it did not commence at the onset of darkness would be dispelled by the arrival of the vehicle at a late hour as apparently some signal of readiness. It would also tax the imagination to speculate what other cargo, especially legal cargo, might be the subject of such a loading operation at that hour in

in that place, under those circumstances and baled in that manner.

After the bobtail pulled away and the interior light revealed to the naked eye as well as the special equipment, according to the testimony, that the tractor trailer had more bales than previously and the other bobtail truck was then brought up to the tractor-trailer and loading resumed, it became apparent for the first time that the cargo was being loaded onto the tractor-trailer instead of off of it. At this point in my opinion for the first time there was probable cause to believe under the totality of the circumstances that a shipment of marijuana was being readied for transportation to some distant distribution points. Probable cause under the rule I announded earlier for an arrest (760) without a warrant and a search incidental to that arrest also came into being.

But for purposes of argument and assuming there is no ground for an arrest at that time, let's move to the question of whether exigent circumstances to justify a warrantless search existed. Actually, it is more of a warrantless seizure than a search.

The evidence is that the first bobtail

truck stayed back to back with the tractor-trailer for 20 to 30 minutes. The second, it would be reasonable to believe, could be expected to stay there for as long for the unloading operation. Since the operations were being conducted during darkness, it was reasonable to believe that the shipment could be expected to depart also under cover of darkness. To take full advantage of the darkness and the hours of darkness, it would be reasonable to expect that a departure would be made just as soon as possible. There is no question in my mind there was a need to conduct a search or to make a seizure before movement. Interstate 10 was nearby. Presumably that or some other well-traveled highway would be employed. There would be great danger on the highway of trying to stop particularly the large tractor-trailer. The fact that defendants could not dispose of the cargo increases the possibility that they might not stop willingly and give resistance instead to the officers. There would be a danger to the traffic on the highway the (761) motoring public as well as to the people involved--the officers and the defendants. There is also the possibility that the vehicles would separate, if all three moved on the highway, and make for a greater problem.

Because of this, the officers, I feel,

were justified in thinking that they might reasonably have less than 20 to 30 minutes at the time they became aware of this to obtain a search warrant. Apparently, the nearest United States Magistrate is Mr. Hebert in Abbeville. The nearest state magistrate judge to that scene is probably myself. I know of no others. I can take judicial notice that I reside approximately 30 minutes from the scene. The officers would undoubtly have to telephone me first to make sure I'm home. I would probably be awakened. I would not be at my best. I would obviously want to discuss this matter on the telephone before giving any kind of answer to the officers. Now the officers might ask me-- they might consider asking me to drive to the scene to save time. But I think it is more reasonable for that officer to think that he would have to come to my home and return to the scene with the warrant, which would take, of course, more time. Time would also have to be taken to write out an affidavit in longhand being careful to spell out the requisite circumstances to justify probable cause. I would have to write out a wrrant in longhand. It would take far more time than the time (762) that the officers reasonably thought that they had available to accomplish this. Indeed, I don't know if such time would

have existed to properly comply with Federal Rule 41 C for a telephonic warrant. I won't go into those requirements in detail, but counsel know that the requirements are more stringent than that which was provided in this case. That the officers even made an attempt is a tribute to their good faith and desire to handle the matter properly.

The argument that the availability of an assistant district attorney or a judge could have been determined earlier, I think, lacks merit. Almost until probable cause existed or until about 11:30 p.m. the officers, according to the evidence, only planned to follow empty vehicles. There was no reason to feel that they would need a warrant. They didn't even know which jurisdictions the vehicles might go into and accordingly were not in a position to know which judges or magistrates to discuss the matter with. I don't know if it can be considered reasonable for them to have determined that availability at 11:30 p.m. when they first might have seen a need for it and in the event probable cause would develop and it may well have been too late, anyway, at that time.

Also, in this discussion of probable cause and exigent circumstances, I might make mention of the rule that

(762) (763)

in this kind of determination the knowledge of the various officers involved in the (763) operation are imputed to each other and that the totality of the knowledge and circumstances has to be considered in making these determinations. STASY VS. U.S., 410, Federal 2nd, 946, Fifth Circuit decision.

Although then this is not the clearest area of the law to work in and I find in the jurisprudence no facts quite like these, nevertheless still sound principles of law, which exist to apply to these facts, and when I do that, I find that there is no unconstitutional invasion of privacy that probable cause existed. I would have issued a warrant.

Thirdly, that exisgent circumstances existed, which made a warrantless arrest, search and seizure legal. I find that there were no other reasonable alternatives available to the officers.

For these reasons, I will deny the Motion to Suppress the Evidence sought to be suppressed.

BY MR. KLEPPNER: At this time, Your Honor, we would like to respectfully object to the Court's ruling and ask that out objection be noted and verbally announce

(763) (764)

our intention to apply for supervisory writs with the Louisiana Supreme Court. Permit us to file a written notice with the Court for our intention to file for writs and the fixing of a time within which to apply. And I would (764) like to ask the Court at this time, if we could, to get some determination of how much time we might be permitted to apply for these writs.

I would suggest to the Court approximately two weeks because of the extensive record we have here and I feel that that is certainly important, but that would be in the nature of a suggestion.

(DISCUSSION OFF THE RECORD)

(HEARING CLOSES.)

March 12, 1979

HONORABLE E. A. DELAHOUSSAYE, III

JUDGE PRESIDING

* * * * *

BY THE COURT:

The record will so reflect that the court has excused the prospective jury venire from the courtroom, and that none of the prospective jurors are now present in the courtroom.

You Gentlemen have a motion to make?

BY MR. ALLAN J. HALL:

Yes, Your Honor. On behalf of each and all defendants, we respectfully move to change the plea of not guilty that was previously entered in this court and move that this court entertain a conditional plea of guilty on the following terms:

That is to say, that we would be allowed to enter a plea of guilty for each and every client, reserving and subject to the motion and all rights to the Louisiana Supreme Court and thereafter concerning the denial of the motion to suppress and the issues raised in the motion to suppress; and further that this court impose the following sentence as to each and every

(766) (767)

defendant:

This court finds each and every defendant guilty subject to the preserved right of appeal as indicated, and impose a sentence of Fifteen Thousand Dollar (767) ($ 15,000) fine and three (3) years incarceration.

BY THE COURT: And costs.

BY MR. ANDREW C. HALL:

And costs. Three (3) years incarceration, an additional two (2) year period of incarceration in the event the fine is not paid, and that the bonds pending appeal be continued in current amount, and subject to the same conditions.

BY THE COURT:

Is the agreement just stated by Mr. Hall, is that ...

BY MR. ANDREW HALL:

And the abandonment of any claim by any of these defendants to the money seized at the time of the arrest.

BY THE COURT:

The Eleven Thousand Dollars ($11,000). It is the intention of all counsel to enter such a plea?

(767) (768)

BY MR. ANDREW C. HALL:

Yes, sir.

BY MR. ALLAN J. HALL:

Yes, sir.

BY MR. ROBERT W. CHESTNEY:

Yes, sir.

BY MR. JOHN LARRY VIDRINE:

Yes, sir.

BY MR. FERDINAND J. KLEPPNER:

Yes, sir.

(768) (768)

BY THE COURT:

Mr. Tucker, is the State of Louisiana willing to accept that plea?

BY MR. TUCKER:

We are, Your Honor. I would just like to ascertain for the record that we're speaking to people who represent Larry Cannon?

BY MR. ANDREW HALL:

Yes, I represent Mr. Cannon and Mr.Grassi.

(768) (769)

BY MR. TUCKER:

And Mr. Grassi, Jonathan Grassi and James R. Green, Jr.

BY MR. ALLAN HALL:

Yes, Your Honor. I represent Mr. Green and Mr. Smith.

BY MR. TUCKER:

And Mr. Wilbur L. Smith. John R. Perdian, also known as John Zerbe.

BY MR. KLEPPNER:

John Zerbe. I represent Mr. Zerbe.

BY THE COURT:

Perdian on the indictment, also known as Zerbe.

BY MR. TUCKER:

In that case, I'd like to amend the information to read, "AKA John Zerbe".

BY THE COURT:

It's already in the information, I believe.

(769) (769)

BY MR. TUCKER:

It's already in there. Okay. Bernis

Davidson.

BY MR. KLEPPNER:

I represent Mr. Davidson. I also represent Mr. Dupuis.

BY MR. TUCKER:

Mr. Jeff Dupuis. Alright, Your Honor, they're all present in court.

BY THE COURT:

Will the individual defendants stand before the bar, please, at the table. Will you raise your right hands, please?

(At this time, all defendants were sworn).

BY MR. TUCKER:

Your Honor, we understood that the vehicles that were already seized by the Federals are not in this case whatsoever.

BY MR. ANDREW C. HALL:

That is correct.

BY MR. ALLAN J. HALL:

That is correct.

BY MR. ROBERT W. CHESTNEY:

That is correct.

BY MR. JOHN LARRY VIDRINE:

That is correct.

BY MR. KLEPPNER:

That is correct.

BY THE COURT:

That is my understanding (770) to what you said. Alright, Mr. Larry Cannon; Mr. James Green, Jr.

DEFENDANT GREEN: Yes.

BY THE COURT:

Mr. Jonathan Grassi, also known as James Robert Benjamin.

DEFENDANT GRASSI: Yes, sir.

BY THE COURT:

Wilbur L. Smith.

DEFENDANT SMITH: Yes, sir.

BY THE COURT:

Mr. John Henry Zerbe.

DEFENDANT ZERBE: Here, sir.

BY THE COURT:
Mr. Bernice H. Davidson.

(770) (771)

DEFENDANT DAVIDSON: Here, sir.

BY THE COURT:

Mr. Jeff H. Dupuis.

DEFENDANT DUPUIS: Here, sir.

BY THE COURT:

You, Gentlemen, are charged by the State of Louisiana in a bill of information charing that on or about the 16th day of June, 1978, you did knowingly and intentionally (771) possess with intent to distribute twenty (20) tons, more or less, of a controlled dangerous substance classified in Schedule 1, to-wit, marijuana, in violation of Louisiana Revised Statutes, Title 40, Section 966-A, Uniform Controlled Dangerous Substances Act.

You understand the charge which is brought against you by the State of Louisiana.

DEFENDANT GREEN: I do, sir.

DEFENDANT GRASSI: I do, sir.

DEFENDANT SMITH: I do, sir.

DEFENDANT ZERBE: I do, sir.

DEFENDANT DAVIDSON: I do, sir.

(771) (772)

DEFENDANT DUPUIS: I do, sir.

DEFENDANT CANNON: I do, sir.

BY THE COURT:

Do you understand that the maximum penalty for this offense is a fine of Fifteen Thousand Dollars ($15,000), or imprisonment for not more than ten (10) years at hard labor or both.

DEFENDANT GREEN: Yes, sir.

DEFENDANT GRASSI: Yes, sir.

DEFENDANT SMITH: Yes, sir.

DEFENDANT ZERBE: Yes, sir.

DEFENDANT DAVIDSON: Yes, sir.

DEFENDANT DUPUIS: Yes, sir.

DEFENDANT CANNON: Yes, sir.

(772) (772)

BY THE COURT:

It's been indicated to the court by the attorneys who represent each of you that you are willing to enter a plea of guilty to the charge just mentioned and that the court is willing to impose a sentence on you just mentioned by the attorneys.

Before the court can accept the plea, the law requires that the court satisfy itself that each of you is a person able to understand and comprehend the nature of the charges against you and the nature and consequences of your pleading guilty to this charge. And if I satisfy myself that you are so capable, then I may accept your plea, but if I'm not so satisfied that you are capable of understanding and comprehending the charges against you, I of course cannot accept your plea.

Mr. Cannon, I'll address a few remarks to you.

QUESTIONS BY THE COURT ADDRESSED TO DEFENDANT CANNON:

Q Mr. Cannon, how old are you, sir?

A Thirty-four.

Q And are you married?

A Yes, sir.

Q What is your permanent address?

A 465 North Clarenton Avenue, Scottsdale, Georgia.

Q I didn't hear. Scottsdale, Georgia?

A Scottsdale, Georgia.

Q Alright, sir. How much education do you have, Mr. Cannon?

A High school.

Q You did finish high school?

A Yes, sir.

Q You're able to read and write and understand the English language?

A Yes, sir.

Q You had any post high school training such as a military service connected training or trade school or college?

A I've had several trade school courses.

Q In what field?

A In heating and air conditioning, air balance.

Q You can read blueprints and sketches and schematics and things like that?

A Yes, sir.

Q Alright, sir. You understand the charges against you?

A Yes, sir.

Q You understand the nature and the consequences of the charges as well

as the nature and the consequences of your pleading guilty to this charge. Of course, I'm anticipating you reserving your right of appeal to the Supreme Court on the question of the motion to suppress.

A Yes, sir.

Q Have you had ample and sufficient time to meet with your lawyer and to discuss with him the nature and the consequences of your pleading guilty to this charge?

A Yes, sir.

Q You understand everything he's told you about this?

A Yes, sir.

Q You're satisfied with the services he has rendered to you?

A Yes, sir.

Q Alright.

QUESTIONS BY THE COURT TO DEFENDANT GREEN:

Q I'll next address Mr. James R. Green, Jr. Mr. Green, is that you correct name, James R. Green, Jr.?

A Yes, sir.

Q How old are you, sir?

A Thirty-eight.

Q Are you married?

A Yes, sir.

Q You have a family, children?

A No.

Q No children.

A No.

Q What is your permanent address?

A Post Office Box 23, Enka, North Carolina.

Q Enka, E-n-k-a, North Carolina. How much education have you had, Mr. Green?

A Tenth grade.

Q You can read and write the English language satisfactorily?

A Yes, sir.

Q You have any post high school training such as trade school, college or military training?

A The 23rd Infantry, Second Division.

Q Did you attend any training schools other than combat training?

A No, sir.

Q But you are literate. You can read and write and understand what you read and write, can you not?

A Yes, sir.

Q You understand the nature and the consequences of the charges pending against you as well as the nature and consequences of the plea of guilty which has been offered on your behalf?

A Yes, sir.

Q This is what you want to do?

A Yes, sir.

Q You have had ample and sufficient opportunity to meet with your lawyer and to discuss with him the nature and the consequences of the charges as well as the nature and the consequences of your pleading guilty to the charge?

A Yes, sir.

Q You understand everything he's told you about these charges?

A Yes, sir.

Q And you're pleading guilty to this charge with full knowledge of all of your rights.

A Yes, sir.

Q Alright. Thank you sir.

QUESTIONS BY THE COURT TO DEFENDANT GRASSI:

Q The next one is Mr. Jonathan Grassi, also known as James Robert Benjamin.

A Yes, sir.

Q Which is your correct name?

A Jonathan Mark Grassi.

Q Jonathan Mark Grassi?

A Grassi.

Q Are you also known as James Robert Benjamin? Have you used that alias?

A I have, Your Honor.

Q Alright, how old are you, Mr. Grassi?

A I'm thirty-two years old.

Q Are you married?

A Yes, I am.

Q You have children?

A No, sir.

Q What is your permanent address?

A 1343 La Vista Road, Atlanta, Georiga.

Q What is your education?

A I have a degree in political science from Northeastern University.

Q And obviously, therefore, you are literate and you can read and write and understand the English language.

A I am literate and I understand the charges against me.

Q You understand the nature and the consequences of the charges against you?

A I do, Your Honor, that's why I ...

Q And the nature and the consequences of you pleading guilty to that charge.

A Yes, I do, Your Honor.

Q And you've had ample and sufficient time to meet with your lawyer and discuss with him the nature and (777) the consequences of these charges and of pleading guilty to these charges?

A Yes, Your Honor.

Q You're satisfied with the services your counsel has rendered to you in these proceedings?

A More than satisfied, Your Honor.

Q Thank you, that's all.

QUESTIONS BY THE COURT TO DEFENDANT SMITH:

Q Mr. Wilbur L. Smith.

A Yes, sir.

Q How old are you, Mr. Smith?

A Forty.

Q Are you married?

A I got a divorce.

Q You're not now married?

A Not at the present.

Q You have children?

A Yes, four.

Q You support your children?

A Yes, sir.

(777) (778)

Q What is your educational background?

A Tenth grade.

Q You can read and write satisfactorily?

A Yes, sir.

Q And understand what you read and write?

A Yes, sir.

Q You have had ample and sufficient opportunity to meet with your lawyer and discuss with him the (778) nature and the consequences of the charges against you as well as the nature and the consequences of your pleading guilty to these charges?

A Yes, sir.

Q Alright, you understand everything he's told you about these matters?

A Yes, sir.

Q You are satisfied completely with the services he's performed for you?

A Yes, sir.

Q Alright, thank you, Mr. Smith.

(778) (779)

QUESTIONS ADDRESSED BY THE COURT TO DEFENDANT ZERBE:

Q Mr. Perdian, also known as John Henry Zerbe.

A Yes, sir.

Q Which is your correct name, Mr. Perdian?

A John Henry Zerbe.

Q Your correct name is John Henry Zerbe, but you've also used an alias of John R. Perdian?

A Yes, sir.

Q Alright, Mr. Zerbe, how old are you?

A I'm twenty-two years old.

Q Are you married?

A No, sir.

Q Have you ever been married?

A No, sir.

Q What is your educational background?

A I have a high school diploma.

(779)

Q Any college training at all?

A No, sir.

Q Any trade school or occupational school?

A I have had some occupational training, sir.

Q In what field?

A Welding.

Q You can read blueprints and you can read manuals and things like that?

A Yes, sir.

Q You understand the nature and the consequences of the charges pending against you and the nature and the consequences of your pleading guilty to those charges?

A Yes, sir.

Q You've had ample and sufficient time to meet with your lawyer and to discuss with him these matters?

A Yes, sir.

Q You understand everything he's told you about these matters?

A Yes, sir.

Q And you're satisfied with the services

(779) (780)

he has rendered to you in these matters?

A Yes, sir.

Q Alright, thank you.

QUESTIONS BY THE COURT ADDRESSED TO DEFENDANT DAVIDSON:

Q Mr. Davidson, your name is Bernice H. Davidson?

A Yes, sir.

Q How old are you, Mr. Davidson?

(780) (780)

A Thirty-three.

Q Are you married?

A Yes, sir.

Q Are you living with your family?

A Yes, I am.

Q You have children?

A Yes, sir.

Q What is your educational background?

A I have twelve years of high school,

twelve years of school, two years of military. I finished cosmetology, fifteen hundred hours.

Q You finished college, you say?

A Cosmetology. I'm a hair stylist--was. I was a hair dresser.

Q Oh, I see, cosmetology.

A I'm in electrical trade school now.

Q But you are literate. You understand and read and write and speak the English language completely.

A Yes, sir.

Q You understand the nature and the consequences of the charges against you and are pleading guilty to these charges...

A Yes, sir, I do.

Q Have you had ample and sufficient time to meet with your lawyer to discuss with him the nature and the consequences of these charges and of your plea of guilty to these charges?

A Yes, sir, I have.

Q Are you satisfied with the services your lawyer has performed for you in this matter?

(780) (781)

A Yes, sir.

(781) (781)

Q Thank you. That's all.

QUESTIONS BY THE COURT ADDRESSED TO DEFENDANT DUPUIS:

Q And Mr. Dupuis, how old are you, sir?

A Thirty.

Q Are you married?

A Yes, I am.

Q Do you have a family?

A Yes, sir.

QUESTION BY THE COURT ADDRESSED TO DEFENDANT DAVIDSON:

Q Excuse me. Did I get your permanent address, please?

A Route 5, Box 284, Breaux Bridge.

Q Thank you.

(781) (782)

QUESTIONS BY THE COURT ADDRESSED TO DEFENDANT DUPUIS:

Q Mr. Dupuis, what is your educational...

A I have a high school education and I also have five years in electrical.

Q You are literate, you can read and write and speak the English language and understand what you read and write?

A Yes, I can.

Q What's your permanent address?

A Route 5, Box 300, Breaux Bridge.

Q You understand the nature and the consequences of the charges against you as well as the nature and the consequences of your pleading guilty to these (782) charges?

A Yes, sir, I do.

Q Have you had ample and sufficient time to meet with your lawyer and to discuss with him the nature and the consequences of these matters?

A Yes Your Honor, I have.

Q You're completely satisfied with the services he's performed for you in these matters?

(782) (783)

A I am, Your Honor.

Q Thank you, very much.

BY THE COURT:

Now, I'm going to address some questions to you as a group, and the nature and the information of the questions I will ask you is to inform you again of your constitutional and legal rights in connection with the charges and the plea of guilty. The law requires that I do that. You may think it's useless, because I'm sure your lawyer--and I've just found out that your lawyers have discussed these matters with you. But the United States Supreme Court says that the trial judge must satisfy himself as a result of the questions asked that each of you understands and waives the constitutional rights that the law guarantees to you as a result of the charges filed against you. I must, therefore, satisfy myself.

Do each one of you under- (783) that you have the right to be represented by a lawyer, either one that you hire yourself or if you cannot afford to hire a lawyer, one would be appointed to represent you at no cost to you by this court. Do you understand your right to be represented by a lawyer?

DEFENDANT GREEN: Yes, sir.

DEFENDANT GRASSI: Yes, sir.

DEFENDANT SMITH: Yes, sir.

DEFENDANT ZERBE: Yes, sir.

DEFENDANT DAVIDSON: Yes, sir.

DEFENDANT DUPUIS: Yes, sir.

DEFENDANT CANNON: Yes, sir.

BY THE COURT:

Each one of you is represented by counsel, is that correct?

DEFENDANT GREEN: That's correct, Your Honor.

DEFENDANT GRASSI: That's correct.

DEFENDANT SMITH: That's correct.

DEFENDANT ZERBE: That's correct.

DEFENDANT DAVIDSON: That's correct.

DEFENDANT DUPUIS: That's correct.

DEFENDANT CANNON: That's correct.

BY THE COURT:

And you've had ample and sufficient time to discuss with your counsel the charges pending against you and the nature and the consequences of your proposed plea. Is that right?

DEFENDANT GREEN: Yes, sir.

DEFENDANT GRASSI: Yes, sir.

DEFENDANT SMITH: Yes, sir.

DEFENDANT ZERBE: Yes, sir.

DEFENDANT DAVIDSON: Yes, sir.

DEFENDANT DUPUIS: Yes, sir.

DEFENDANT CANNON: Yes, sir.

BY THE COURT:

The next right you have is the right to trial by jury. You have a right under our law to be tried by a jury of twelve (12) citizens from St. Martin Parish. The State of Louisiana at that trial would have the burden of proving your guilt beyind a reasonable doubt. You would not have to prove your innocence. You would not have to prove anything.

(784) (785)

The State of Louisiana would have to prove your guilt beyond a reasonable doubt of the crime charged or of any lesser and responsive crime included in it. But by pleading guilty to this charge, you waive or give up your right to trial by jury of twelve (12) citizens, ten (10) of whom would have to agree in order to render a verdict in your case. Do each one of you understand your right to trial by jury?

DEFENDANT GREEN: Yes, Your Honor.

DEFENDANT GRASSI: Yes, sir.

DEFENDANT SMITH: Yes, sir.

DEFENDANT ZERBE: Yes, sir.

(785) (785)

DEFENDANT DAVIDSON: Yes, sir.

DEFENDANT DUPUIS: Yes, sir.

DEFENDANT CANNON: Yes, sir.

BY THE COURT:

Do each one of you wish to waive and give up your right to trial by jury?

DEFENDANT GREEN: Yes.

DEFENDANT GRASSI: Yes.

DEFENDANT SMITH: Yes.

DEFENDANT ZERBE: Yes.

DEFENDANT DUPUIS: Yes.

DEFENDANT CANNON: Yes.

BY THE COURT:

The next right that you have is the right and privilege against self incrimination. What that means is that under our Constitution, no person can be made to give evidence against themselves. They have an absolute right to remain silent and not give any statements or evidence which might incriminate themselves or implicate themselves in the commission of any crime, but by pleading guilty to the charges against you, you waive and give up your right and privilege against self incrimination. Do each one of you understand that by pleading guilty, you are waiving and giving up this constitutional right?

DEFENDANT GREEN: (Nods affirmatively).

DEFENDANT GRASSI: (Nods affirmatively).

DEFENDANT SMITH: (Nods affirmatively).

DEFENDANT ZERBE: (Nods affirmatively).

DEFENDANT DAVIDSON: (Nods affirmatively).

DEFENDANT DUPUIS: (Nods affirmatively).

DEFENDANT CANNON: (Nods affirmatively).

BY THE COURT:

And that's what you want to do of your own free and voluntary will?

DEFENDANT GREEN: Yes.

DEFENDANT GRASSI: Yes.

DEFENDANT SMITH: Yes.

DEFENDANT ZERBE: Yes.

DEFENDANT DAVIDSON: Yes.

DEFENDANT DUPUIS: Yes.

DEFENDANT CANNON: Yes.

(786) (787)

BY THE COURT:

The third right you have is to confrontation of the witnesses. What that means is that under the Constitution of the United States and of the State of Louisiana, any person charged with a crime has the right to a trial, and at that trial has a right to have the State of Louisiana bring into court and place under oath and have the witnesses who would testify against you or would testify in order to attempt to establish your guilt from the witness stand in open court and in public, and your lawyers would have the right to cross examine those (787) witnesses, to question them with respect to any matters of this case or to attempt to impeach their testimony, but that by pleading guilty to the charge you waive and give up not only your right to trial by jury but your right and privilege to confrontation by the witnesses or the accusers against you. Do each one of you understand this right?

DEFENDANT GREEN: I do.

DEFENDANT GRASSI: I do.

DEFENDANT SMITH: I do.

DEFENDANT ZERBE: I do.

DEFENDANT DAVIDSON: I do.

DEFENDANT DUPUIS: I do.

DEFENDANT CANNON: I do.

BY THE COURT:

And do each one of you wish to waive this right?

DEFENDANT GREEN: Yes.

DEFENDANT GRASSI: Yes.

DEFENDANT SMITH: Yes.

DEFENDANT ZERBE: Yes.

DEFENDANT DUPUIS: Yes.

DEFENDANT CANNON Yes.

BY THE COURT:

Another right you have is the right and privilege to compulsory process. What that means again very simply is that you would have the right if you went

to trial to have this court exercise its power and authority to issue subpoenas either for the persons of witnesses who would testify for you or on your behalf or for documents by issuing a subpoena duces tecum which would require that documents be brought into court to assist you in the preparation of your defense. But by pleading guilty to this charge, in addition to waiving your right to trial, you waive and give up your right to compulsory process. You understand that right? Do each of you understand that right?

DEFENDANT GREEN: (Nods affirmatively.)

DEFENDANT GRASSI: (Nods affirmatively.)

DEFENDANT SMITH: (Nods affirmatively.)

DEFENDANT ZERBE: (Nods affirmatively.)

DEFENDANT DAVIDSON: (Nods affirmatively.)

DEFENDANT DUPUIS: (Nods affirmatively.)

DEFENDANT CANNON: (Nods affirmatively.)

BY THE COURT: And is it your wish and intent to waive this right?

(788) (789)

DEFENDANT GREEN: Yes.

DEFENDANT GRASSI: Yes,

DEFENDANT SMITH: Yes.

DEFENDANT ZERBE: Yes.

DEFENDANT DUPUIS: Yes.

DEFENDANT CANNON: Yes.

(789) (789)

BY THE COURT: Finally, if you went to trial on this matter as I've advised you is your right, and if you were convicted by the jury, if the jury returned a verdict of guilty on either the charge which is pending against you, possession of marijuana with intent to distribute, or any of the lesser and included verdicts--crimes included in that charge, you would have the right to appeal to the Supreme Court of Louisiana to have that court decide the correctness of the jury's verdict and any sentence which might be imposed in accordance with law, and you would also have the right to be represented on that appeal by a lawyer, either one that you hire yourself,

(789) (790)

or if you could not afford to hire one, one would be appointed to represent you at no cost to you. But by pleading guilty to this charge you waive and give up not only your right to trial by jury but the right you have to appeal to the Supreme Court on the question of innocence or guilt. But I further instruct you that I am specifically reserving onto you the right to appeal to the Supreme Court on the question of the validity of the ruling of the court in connection with your mo tion to suppress are being waived by your plea of guilty, except of course your right

(790) (790)

to object to the jurisdiction of the court. Now that's a little technical, but I ask each one of you if you understand what I've just said. And if you don't understand, I'll be glad to answer any question that you might have with respect to that. Do each one of you understand what I've just said.

DEFENDANT GREEN: Yes, we do.

DEFENDANT GRASSI: Yes.

DEFENDANT SMITH: Yes.

(790) (791)

DEFENDANT ZERBE: Yes.

DEFENDANT DUPUIS: Yes.

DEFENDANT CANNON: Yes.

BY THE COURT: And you wish to waive your trial by jury and your right to appeal except that you want to reserve your right on your motion to suppress. Is that what you want to do?

I have discussed this matter with your attorneys and with the State of Louisiana through its District Attorney, Mr. Tucker, and even though I am not personally in favor of accepting conditional pleas, I have indicated to them my willingness to accept your plea of guilty to this charge and to impose the following sentence:

To sentence you to pay a fine of Fifteen Thousand Dollars ($15,000) and cost each, and in default of the payment of fine and cost, that you serve two (2) years at hard labor

(791) (791)

under the supervision of the Department of Corrections, in addition to which I have agreed to impose a mandatory prison sentence of three (3) years at hard labor

under the supervision of the Department of Corrections. I will, however, reserve onto each of you the right to appeal to the Supreme Court of the State of Louisiana to have that court review and determine the correctness of this court's earlier ruling in connection with the motion to suppress evidence. In addition the court will order that the Eleven Thousand Dollars ($11,000) which as been seized be forfeited to the State of Louisiana as a result of the disclaimer thereof which has been tendered by your attorneys.

Now do each one of you understand the court's proposed sentence.

DEFENDANT GREEN: Yes, Your Honor.

DEFENDANT GRASSI: Yes, Your Honor.

DEFENDANT SMITH: Yes, Your Honor.

DEFENDANT ZERBE: Yes, Your Honor.

DEFENDANT DAVIDSON: Yes, Your Honor.

DEFENDANT DUPUIS: Yes, Your Honor.

DEFENDANT CANNON: Yes, Your Honor.

(791) (792)

BY THE COURT: Do any of you have any question in connection with that.

DEFENDANT GREEN: No.

(792) (792)

DEFENDANT GRASSI: No.

DEFENDANT SMITH: No.

DEFENDANT ZERBE: No.

DEFENDANT DAVIDSON: No.

DEFENDANT DUPUIS: No.

DEFENDANT CANNON: No.

BY THE COURT: Alright, aside from that committment which I have made to your attorneys and I now make to you, has anyone attempted to threaten you or to force you or to bring pressure upon you or to induce you by any means other than your free and voluntary will to plead guilty to this charge?

BY MR. ANDREW HALL: Excuse me, Your Honor, I think that they would be allowed--that their present bond would be continued.

(792) (793)

BY THE COURT: That's correct. I will allow them to be free on their present bond pending their appeal. That was an oversight. I had no intention...

BY MR. ANDREW HALL: That was part of the promises, I believe.

BY THE COURT: Again, Gentlemen, I ask you aside from that committment which I have made to your attorneys and to the State through its District Attorney and to you, has anybody

(793) (793)

at all threatened to force or to bring duress or threats or pressures or anything to get you to do something that you don't want to do in this connection.

DEFENDANT GREEN: No, sir.

DEFENDANT GRASSI: No, sir.

DEFENDANT SMITH: No, sir.

DEFENDANT ZERBE: No, sir.

DEFENDANT DAVIDSON: No, sir.

DEFENDANT DUPUIS: No, sir.

DEFENDANT CANNON: No, sir.

BY THE COURT: Are you pleading guilty to the charge of possession with intent to distribute marijuana of your own free and voluntary will and because that is what you want to do?

DEFENDANT GREEN: Yes.

DEFENDANT GRASSI: Yes.

DEFENDANT SMITH: Yes.

DEFENDANT ZERBE: Yes.

DEFENDANT DUPUIS: Yes.

DEFENDANT CANNON: Yes.

BY THE COURT: And are you pleading guilty to the charge because in truth and in fact on the 16th day of June, 1978, in the Parish of St. Martin, Louisiana, you did knowingly and intentionally possess with intent to distribute approximately twenty (20) tons, more or less,

of marijuana as you are charged with in the indictment?

DEFENDANT GREEN: Yes.

DEFENDANT GRASSI: Yes.

DEFENDANT SMITH: Yes.

DEFENDANT ZERBE: Yes.

DEFENDANT DUPUIS: Yes.

DEFENDANT CANNON: Yes.

BY THE COURT: The second gentleman from the right.

DFENDANT DAVIDSON: Yes.

BY THE COURT: Do you have any questions about what I've said? Everything I've said you've agreed to?

DEFENDANT DAVIDSON: (Nods affirmatively.)

BY THE COURT: Let the record reflect that after judicial interrogation each of the defendants separately and then each of them collectively,

(794) (795)

the court has satisfied itself that these defendants have been fully and completely informed of their constitutional and statutory rights and specifically those ennunciated in Boykin v. Alabama, that they are persons who are capable of and in fact do understand the nature and consequences

(795) (795)

of the charges against them, the nature and the consequences of their pleading guilty to these charges and that they have made a knowing and intentional waiver of all of their said constitutional and statutory rights, and that there is a factual basis for accepting the plea of guilty to the charge against them. And the court will therefore accept the plea of guilty tendered on behalf of each defendant.

Do any counsel wish to make any remarks before the court imposes sentence?

(All counsel indicate negatively.)

BY MR. KLEPPNER: No, Your Honor, and we waive all delays and stand ready for sentence.

(795) (796)

BY MR. ANDREW HALL: We had indicated to Your Honor that we will accept the proof, the independent proof of facts as to the transcript of the motion to suppress. And I think the motion will so reflect.

BY THE COURT: The court will therefore enlarge upon its findings to the extent that the evidence which was presented at the motion to suppress which is in the transcript and in the record has satisfied the court that there is of course a factual basis for accepting the plea.
Alright, pusruant to Revised

(796) (796)

Statutes, Title 40, Section 966...

BY MR. TUCKER: If Your Honor please.

BY THE COURT: Mr. Tucker.

BY MR. TUCKER: We'd better obtain a waiver of the twenty-four (24) hours.

(All counsel indicated willingness to waive.)

BY THE COURT: That's not necessary under the law. On a plea of guilty, you don't have to waive the twenty-four (24) hours. It's only on a conviction.

But the record will reflect that each counsel has waived any and all delays.

BY MR. TUCKER: This appeal right.

BY THE COURT: And asked for immediate imposition of sentence. Is that correct?

BY MR. ANDREW HALL: That's correct.

BY MR. ALLAN J. HALL: That's correct.

BY MR. CHESTNEY: That's correct.

BY MR. VIDRINE: That's correct.

BY MR. KLEPPNER: That's correct.

BY THE COURT: The court will sentence

Larry A. Cannon, James R. Green, Jr., Jonathon Grassi, also known as James Robert Benjamin, Wilbur L. Smith, John R. Perdian, also known as John Henry Zerbe, Bernice

H. Davidson and Jeff H. Dupuis to each pay a fine of Fifteen Thousand Dollars ($15,000) and court costs and in default of the payment of the payment of the fine and costs, that they serve two years at hard labor under the supervision of the Department of Corrections of the State of Louisiana, in addition to the fine and alternative jail sentence, it is the sentence of this court that each of the defendants serve three (3) years at hard labor under the supervision of the Department of Corrections of the State of Louisiana, and for the execution of this sentence, the defendants are placed in the custody of the Sheriff of St. Martin Parish for transferral to the Department of Corrections in accordance with law.

The court specifically recognizes and reserves onto each of the defendants the right to appeal this sentence to the Supreme Court of the State of Louisiana to question the validity of the order of this court previously entered herein denying the motion to suppress. In addition, the court in recognition of the disclaimer offered on behalf of each defendant to the sum of Eleven Thousand Dollars ($11,000) in cash, the court will declare said Eleven Thousand Dollars

APPENDIX B

STATE of Louisiana

v.

Jeff H. DUPUIS, Bernis H. Davidson, John R. Perdian, Wilbur L. Smith, Jonathan Grassi, James R. Green, Jr. and Larry A. Cannon

No. 64762

Supreme Court of Louisiana.

Dec. 13, 1979

Rehearing Denied Jan. 28, 1980.

Defendants entered guilty pleas in the 16th Judicial District Court, Parish of St. Martin, Edward A. de la Houssaye, III, J., to charges of possesssion of marijuana with intent to distribute, and defendants, who reserved right to appeal denial of motion to suppress, appealed. The Supreme Court, Blanche, J., held that: (1) where sugarcane field from which defendants' unloading operations were observed was leased to others for agricultural purposes and was not exclusively under control of defendant who owned the farm, and there were no signs, fences or gates to exclude public from the area, defendants had no reasonable expectation of privacy as to such field, even though the officers were trespassing when they observed the operations, and thus officers' initial sighting of marijuana from the field did not violate Fourth Amendment; (2) where investigating officers received information from various criminal intelligence sources linking defendants with person suspected of narcotics trafficking in another state, the officers observed three trucks being maneuvered in total darkness into loading position, and the officers, from their position in sugarcane field, saw what appeared to be bales of marijuana, circumstances constituted probable cause required for warrantless

search of truck; and (3) where bobtail truck had already been unloaded into refrigerated truck when officers tried to get warrant to search and seize marijuana apparently being loaded into trucks by defendants, and it was reasonable for officers to conclude, after another 20 minutes had passed, that the loading operations were almost complete and that the trucks would be leaving, exigent circumstances existed as required to authorize warrantless search of the trucks, and seizure of marijuana by the officers, did not violate Fourth Amendment.

Affirmed.

1. **Searches and Seizures Key 7(10)**

In determining, for Fourth Amendment purposes, whether one has reasonable expectation of privacy, test is not only whether person had actual or subjective expectation of privacy but also whether his expectation of privacy is of type which society at large is prepared to recognize as being reasonable. U.S.C.A. Const. Amend. 4.

2. **Searches and Seizures key 7(10, 20)**

Where sugarcane field from which defendants' unloading operations were observed was leased to others for agricultural purposes and was not exclusively under control of defendant who owned the farm, and there were no signs, fences or gates to exclude public from the area, defendants had no reasonable expectation of privacy as to such field, even though the officers were trespassing when they observed the operations, and thus officers' initial sighting of marijuana from the field did not violate Fourth Amendment. U.S.C.A. Const Amend. 4.

3. **Searches and Seizures key 7(1)**

For purposes of Fourth Amendment, use of extrasensory means of probing does not increase extent of intrusion. U.S.C.

A. Const. Amend. 4.

4. Searches and Seizures key 7(1)

Warrantless searches and seizures are unreasonable unless they fit within one of limited number of well-delineated exceptions to warrant requirement. U.S.C.A. Const. Amend. 4.

5. Searches and Seizures key 3.3(7)

Warrantless search of automobile may be made based upon existence of probable cause to search the vehicle and exigent circumstances which render it impractical to secure search warrant. U.S.C.A. Const. Amend. 4.

6. Drugs and Narcotics key 183

Where investigating officers received information from various criminal intelligence sources linking defendants with person suspected of narcotics trafficking in another state, the officers observed three trucks being manuevered in total darkness into loading position, and the officers, from their position in sugarcane field, saw what appeared to be bales of marijuana, circumstances constituted probable cause required for warrantless search of the truck. U.S.C.A. Const. Amend. 4.

7. Drugs and Narcotics key 183
Searches and Seizure key 7(20)

Where bobtail truck had already been unloaded into refrigerated truck when officers tried to get warrant to search and seize marijuana apparently being loaded into trucks by defendants, and it was reasonable for officers to conclude, after another 20 minutes had passed, that the loading operations were almost complete and that the trucks would be leaving, exigent circumstances existed as required to authorize warrantless search of the trucks, and seizure of marijuana by

the officers, who had probable cause required for such actions, did not violate Fourth Amendment. U.S.C.A. Const. Amend. 4.

Andrew C. Hall, Storace, Hall & Hauser, Miami, Fla., Chester R. Cedars, Gauthier & Cedars, Ltd., Breaux Bridge, for Jonathan Grassi and Lawrence A. Cannon.

Allan J. Hall, Hall & Fishman and Robert W. Chestney, Hall & Fishman, Atlanta, Ga. John Larry Vidrine, Ville Platte, for Wilber L. Smith and James R. Green, Jr.

Ferdinand J. Kleppner, Grisbaum & Kleppner, Metairie, for Jeff Dupuis, John Zerbe and Bernis H. Davidson, defendants-appellants.

William J. Guste, Jr., Atty. Gen. Barbara Rutledge, Asst. Atty. Gen., Knowles M. Tucker, Dist. Atty., George W. Mc Hugh, Jr., Dracos D. Burke, Asst. Dist. Attys. for plaintiff-appellee.

BLANCHE, Justice.*

The defendants were charged by a bill of information with the possession of marijuana with the intent to distribute in violation of La. R.S. 40:966 (A). After the defendants' motion to suppress the twenty tons of marijuana as evidence was denied, they plead guilty reserving all rights to appeal the denial of the motion to suppress. Each defendant was sentenced to three years at hard labor and fined $15,000, in default of which each would serve two years.

The police were led to the Dupuis property and the marijuana through a series of events beginning with the discovery of an aircraft in Georgia loaded with 23,000 pounds of marijuana. The aircraft was registered to Marvin Zylstra. A ıew

* Honorable Jesse N. Stone, Jr. served as Justice Ad Hoc in the vacancy created by the resignation of Tate. J.

days before Jeff Dupuis had rented a car as the agent of Marvin Zylstra from an Avis Rent-a-car facility in the Dalton, Alabama airport. After a check of the Breaux Bridge, Louisiana address given by Dupuis, a refrigerated truck was found on the property. This truck was registered to a Mr. Zerbe, who was also known to be an associate of Zylstra through information obtained from the El Paso Intelligence Center. On June 11, 1978, the refrigerated truck left the Dupuis property and returned June 15, 1978 along with two bobtail trucks bearing Georgia license plates. In light of this information, the authorities expected the trucks to depart shortly to pick up a load of marijuana. Therefore, a joint task force of United States Customs Air Officers and Louisiana State Police commenced a surveillance of the Dupuis residence in order to determine when the trucks would leave.

The rural residential area under police surveillance was a corner tract on which is located a house belonging to the defendant Jeff Dupuis, and a mobile home occupied by the defendant Bernis Davidson. This compound was bounded on the west by State Highway 349, on the north by a parish road, and on the east and south by fields of sugar cane. Between the sugar cane field and the house ran a shell road.

Until 7:30 P.M., the officers' activities consisted of simply a roving surveillance on the public roads. At 7:30 P.M., two officers proceeded by foot from the parish road on the north side of the property through the sugar cane field to a point south of the Dupuis yard. About 11:00 P.M., the officers noticed that the three trucks parked on the private road between the residence and the fields were being maneuvered for some loading operation. When the rear doors of the trailer were opened, one of the officers, through the use of night viewing equipment, observed large bales of a substance he presumed to be marijuana because of the size and shape of the

bales. Later, when the first bobtail truck moved from the back of the trailer, the interior light of the truck allowed the officers to see the bales with their unaided eyes. At this point, the officers attempted to obtain a telephone search warrant. After obtaining the warrant, the officers moved in and arrested the defendants and seized the trucks and their contents.

[1] The state has stipulated that the warrant obtained by the officers is invalid since the requirements for a telephone search warrant had not been met. Based upon these facts, the trial court denied the defendants' motion to suppress. The defendants have urged that the original trespass onto their property (the sugar cane fields) for the purpose of observing their activities violated their Fourt Amendment rights to privacy. In *Katz v. U.S.*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), the United States Supreme Court abandoned the motion that the Fourth Amendment protection was implemented in certain "constitutionally protected areas". The courts will now look to the defendant's reasonable expectation of privacy in determining whether the Fourth Amendment applies. In determining whether one has a reasonable expectation of privacy, the test is not only whether the person had an actual or subjective expectation of privacy but also whether their expectation of privacy is of the type which society at large is prepared to recognize as being reasonable. ***State v. Wilbourn,***364 So.2d 995 (La. 1978). In applying the test, it has been held that a search and seizure conducted on the private land of defendant for marijuana violated the Fourth Amendment where the marijuana was not visible from the public road and the private road was posted and a chain barred access to the private road. ***State v. Byers,*** 359 So. 2d 84 (La. 1978).

In ***State v. Fearn***, 345 So.2d 468 (La. 1977), the court found that the dedendant had a reasonable, although not justified,

expectation of privacy because his marijuana plants could not be seen from his parents' house. For this reason, the seizure was held invalid. However, the court noted that the initial viewing of the plants from the neighbor's yard by the police was not an intrusion since the plants were clearly visible from this point.

In examining the reasonableness of the defendant's expectation of privacy, the distinction between open fields and curtilage may be helpful. The Fifth Circuit has held that the search of open fields surrounding a house is not protected under the Fourth Amendment since there is no reasonable expectation of privacy. *U.S. v. Brown*, 473 F.2d 952 (5th Cir. 1973). Thus, in U.S. v. Williams, 581 F.2d 451 (5th Cir. 1978), the Fifth Circuit upheld the seizure of moonshine from the defendant's shed where officers had detected the odor of mash while standing outside the curtilage of defendant's home despite the fact that they had trespassed onto his property.

[2, 3] In the instant case, the field from which the defendants' operations were observed was leased to others for agricultural purposes. Thus, the field, like the neighbor's yard in *Fearn*, was not exclusively in the control of the defendant. There were no signs, fences or gates to exclude the public as in *Byers* from the area. In fact, any stranger could have driven down the shell road or been in the field and observed the defendants' loading activities.

As in *Williams*, the police's observations were made from a field outside the curtilage of the Dupuis home. Although the officers were trespassing, the defendants had no reasonable expectation of privacy as to this field. Of course, the use of extrasensory means of probing does increase the extent of an intrusion. The problem created by the use of night viewing

equipment is pretermitted here since the police officer testified that he was able to clearly discern the characteristic wrappings of bales of marijuana with his unaided eyes as the bobtail truck pulled off. Therefore, we conclude that the initial sighting of the marijuana by the officers from the sugar cane field did not violate the Fourth Amendment since the defendants had no reasonable expectation that their activities would remain private.

[4] The state has conceded that the telephone search warrant is invalid. Therefore, the seizure of the trucks and their contents must be justified as a warrantless seizure. The rule is well established that warrantless searches and seizures are unreasonable unless they fit within one of the limited number of well-delineated exceptions to the warrant requirement. ***State v. Guzman***, 362 So. 2d 744 (La. 1978); ***State v. Daigre***, 364 So. 2d 902 (La. 1978).

[5] One of these exceptions to the warrant requirement is the so-called "automobile exception". This exception is based upon the existence of probable cause to search the vehicle and exigent circumstances which render it impractical to secure a warrant. ***State v. Spencer***, 374 So. 2d 1195 (La. 1979).

[6] In determining whether the officers had probable cause to seize the marijuana, we must determine if under the facts and circumstances known to the police at the time of the seizure, a reasonable person would conclude that contraband was present. In this case, officers received information from various criminal intelligence sources linking the defendants with persons suspected of narcotics trafficking in Georgia. The officers observed three trucks being maneuvered in total darkness into a loading position. Further, from their position in the cane field, they saw what appeared to be bales of mari-

juana.

Although the sighting of the bales alone may have been sufficient to justify a belief that contraband was present, it should be noted that there were other underlying facts which supported the police's suspicions. Customs officials had discovered an abandoned plane in Georgia filled with marijuana and registered to Marvin Zylstra. The defendant, Jeff Dupuis, had rented a car in Alabama as Mr. Zylstra's agent. Further, officers discovered a refrigerated truck at the Dupuis residence which was registered to Mr. Zerbe, an associate of Mr. Zylstra. The officers testified that such refrigerated trucks are a common method of transporting marijuana. This information, although insufficient in itself to establish probable cause, was enough to arouse police suspicions. The subsequent arrival of trucks bearing Goergia license plates, the midnight loading activities and the sighting of the bales combined with the other information were sufficient facts and circumstances to constitute probable cause.

[7] We also conclude that exigent circumstances existed. One of the bobtail trucks had already been unloaded into the refrigerated truck within 20 or 30 minutes. At this point, the officers tried to get the warrant. After another 20 minutes had passed, it was reasonable to conclude that the loading operations were almost complete and that the trucks would be leaving. Since the departure of the trucks was imminent, the officers were justified in moving in to arrest the defendants and seize the trucks without waiting to secure a warrant. See ***State v. Spencer, supra***. The trial court properly denied the defendants' motion to suppress since the search and seizure did not violate the Fourth Amendment's protection against unreasonable searches and seizures.

For the reasons assigned, the judgment of the trial court is affirmed.

AFFIRMED.

DIXON, J., concurs.

West Key Number System

APPENDIX C

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

April 17, 1980

Ferdinand J. Kleppner
Professional Building
3224 N. Turnbull Drive
Metairie, Louisiana 70002

Re: Jeff J. Dupuis, Bernis H. Davison, John Zerbe, and Wilbur Smith v. Louisiana
A - 889

Dear Mr. Kleppner:

Your application for an extension of time in which to file a petition for a writ of certiorari in the above-entitled case has been presented to Mr. Justice Powell who, on April 16, 1980, signed an order extending your time to and including June 26, 1980.

A copy of the Justice's order is enclosed.

Very truly yours,

MICHAEL RODAK, JR., Clerk

ByFrancis J. Lorson /s/

Francis J. Lorson
Deputy Clerk

VM
Enc.

cc: Clerk, Supreme Court of Louisiana
301 Loyola Avenue
New Orleans, Louisiana 70112

District Attorney for the
Parish of St. Martin
District Courthouse
New Iberia, Louisiana

SUPREME COURT OF THE UNITED STATES

No. A-889

JEFF DUPUIS, BERNIS H. DAVISON,
JOHN ZERBRE AND WILBUR L. SMITH,
Petitioners

V.

LOUISIANA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

June 26, 1980

/s/ Lewis E. Powell, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 16th

day of April, 1980

APPENDIX C

Court pursuant to notice of any and all proceedings served upon his counsel of record in this State.

Defendant herein named does further appoint and designate Chester R. Cedars one of his counsel of record as the person upon whom service of all notices in connection with this case shall be served, including notices of appearances required under the bond herein furnished, and specifically acknowledges that notice served on said Chester R. Cedars shall be the same as service on him personally in the event of a forfeiture of the bond or for any other purpose in this proceedings whatsoever.

Respectfully submitted,
GAUTHIER & CEDARS, LTD.
(A Professional Law Corporation)

Chester R. Cedars /s/
Chester R. Cedars
Post Office Drawer 955
Breaux Bridge, La. 70517

Ferdinand J. Kleppner /s/
Ferdinand J. Kleppner
3224 N. Turnbull Drive
Metairie, La. 70002

Allan J. Hall /s/
Allan J. Hall
Tower Place - Suite 1940
3340 Peachtree Road N.E.
Atlanta, Ga. 30326

I, the undersigned District Attorney for the Parish of St. Martin, State of Louisiana, have no opposition to the granting of the foregoing Motion to Leave Jurisdiction.

Knowles Tucker /s/
Knowles Tucker, District Attorney

CONCURRENCE

I, C. Guillot, representative of Roger Williams Ins. Co., the surety in the bond for Lawrence Allen Cannon, defendant in the captioned proceeding, do hereby declare that said surety does fully concur, acquiesce, and has no objection whatsoever in the above and foregoing Motion to Leave Jurisdiction filed by defendant.

C. Guillot /s/
Surety

Filed June 27, 1978
Defendant's Exhibit 3

In the matter of the application of the United States of America for a search warrant authorizing the search of vehicles and persons located in the vicinity of the residence at Route one, Box 674, Breaux Bridge, Louisiana in the Western Division of Louisiana.

AFFIDAVIT

Richard M. Joachim being duly sworn states:

1. The time now is 11:57 and the date is June 15, 1978. My name is Richard Joachim, U. S. Customs Air Officer, Orleans, Louisiana.

2. On this date a tractor trailer truck was seen at Route One, Box 674, Breaux Bridge, Louisiana. The truck is registered to Zerby and Sons, 113 Claymore Drive, Lafayette, Louisiana. Mr. Zerby is an associate of Marvin J. Zylstra, who is the subject of a federal court order issued for a transponder installed on the Aircraft N888RH on March 24, 1978.

3. The residence Route one, Box 674 is the residence of Jeffery Dupuis, an associate of Marvin J. Zylstra. This vehicle was at this residence for approximately seven weeks; the trailer only. On Sunday, June 11, 1978. The truck left the residence and returned to the residence the morning of June 15, 1978 with two other 77 or 78 Dodge 3 ½ to 5 ton Bobtail trucks with Georgia plates.

4. At approximately 11:15 P.M. on June 15, 1978, Air Officers and Louisiana State Police Narcotics Officers of Region

Two did observe large bales of a substance which we believed to be marijuana being offloaded from the large truck to the two smaller trucks with Georgia plates.

5. This truck had received sometime between June 11th and June 15th, this year, the marijuana contraband brought in on N888RH, presumably from Columbia or South America. We seek authorization to search for the purpose of determining whether or not the substance is marijuana.

HERBERT: "Do you want to include something to the fact that an emergency situation exists, therefore, justifying the telephonic search warrant?"

JOACHIM: "The reason for the telephonic search warrant is that the off-loading is taking place this very minute. One truck is now full and will be leaving shortly and there would be considerable risk of life to try to attempt to stop the vehicle on the highway. We would like to arrest the violators at the area of the residence and make appropriate arrests."

HEBERT: "Is there a U.S. Attorney available?"

JOACHIM: "No U.S. Attorney is available and no time is available to contact a U.S. Attorney."

HERBERT: "Have you given me your complete identification?"

JOACHIM: "My name is Richard Joachim and I am a U.S. Customs Air Officer assigned to the Air Support Branch, New Orleans, Louisiana. My badge number is 378."

HERBERT: "Do you have a copy or a duplicate of a telephonic search warrant?"

JOACHIM: "No, I sure don't"

HERBERT: "When you execute this search warrant this morning, you won't have any written evidence that a search warrant has been granted. Where are you located now?"

JOACHIM: "I am at Route one, Box 674, Breaux Bridge, Louisiana; LA Highway 349; telephone number (318) 228-2211."

HERBERT: "What information do you have to your knowledge that would indicate to you that the substance that they are loading is marijuana?"

JOACHIM: "Because of the method of packaging and I have personally arrested people and taken and seized marujuana specifically Columbian Marijuana which is baled up in burlap and/or paper sacks or plastics sacks in anywhere from 70 to 90 pounds bales. These bales are like the ones being described by the people on the scene at the vicinity of the two trucks through infra-red and starlight scopes. Even though the unloading is taking place in total darkness, they can readily identify the shapes and sizes of the packages, and it is the opinion of the experienced narcotics officers in the near vicinity of the trucks that there is probable cause to believe that it is marijuana, because of the shape and size of the packages and the conditions under which they unloading them."

HERBERT: "Do you swear to the statements as being true fact to the best of your knowledge?"

JOACHIM: "I do."

HERBERT: "Based on the facts that you stated under oath,

I feel that there is probable cause to issue a search warrant on the facts given me on this telephonic conversation. Because of the emergency situation. I will have this tape in support of an affadivit for the search warrant issued this morning. What time is it?"

JOACHIM: "The time now is 12:09, 6 - 16 - 78."

Richard M. Joachim/s/
Richard M. Joachim, Customs Air Officer

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Filed June 27, 1978

UNITED STATES OF AMERICA
VERSUS
RT. 1, BOX 674, BREAUX BRIDGE,
LOUISIANA

MAGISTRATE'S DOCKET
NUMBER 78-6061M - 01

CERTIFICATE OF THE TESTIMONY
IN SUPPORT OF SEARCH WARRANT

Before J. Byron Hebert, United States Magistrate at Lafayette, Louisiana.

I, J. Byron Herbert, United States Magistrate, hereby certify that the attached is a true and accurate transcript of the communications made to me under oath by telephone at 12:09 a.m., on June 16, 1978, by Richard M. Joachim, United States Customs Air Officer.

Lafayette, Louisiana, June 21, 1978.

Byron Herbert /s/
United States Magistrate

Defendant's Exhibit 4

No. 79-1803
No. 79-2045

Supreme Court, U.S.
FILED
JUL 18 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1803

JONATHAN GRASSI, JAMES R. GREEN,
and LARRY A. CANNON,

Petitioners,

VERSUS
THE STATE OF LOUISIANA

Respondent.

No. 79-2045

JEFF H. DUPUIS, BERNIS H. DAVISON
JOHN ZERBE and WILBUR L. SMITH

Petitioners

VERSUS
STATE OF LOUISIANA

Respondent

BRIEF IN OPPOSITION TO CERTIORARI

KNOWLES TUCKER
DISTRICT ATTORNEY
BY DRACOS D. BURKE
ASSISTANT DISTRICT ATTORNEY
P.O. Box 7
New Iberia, Louisiana 70560
1-318-364-4586

ATTORNEY FOR RESPONDENT

QUESTIONS PRESENTED

I.

Did the lower courts err in holding that petitioners had no reasonable expectation of privacy regarding their nighttime maneuvers of three trucks parked on an open roadway outside of the fence surrounding petitioners' curtilage but adjoining an unfenced open sugar cane field under lease to a third party and from which unfenced cane field narcotics agents were monitoring the movements of the suspect trucks for the purpose of following said trucks to a suspected marijuana transfer point elsewhere, and during which maneuvers petitioners carelessly illuminated the contents of the trucks so that the watching agents unexpectedly observed, with the naked eye, the presence of many large bales of marijuana already loaded in the trucks?

II.

Did the lower courts err in holding that the narcotics agents monitoring the movements of petitioners' three trucks, with the expectation that the trucks were about to move on to an unknown marijuana pickup point, having suddenly and unexpectedly observed with the naked eye large numbers of bales of what the agents recognized as marijuana being transferred from a large truck to the two smaller trucks, the narcotics agents had probable cause and sufficient exigent circumstances to authorize immediate warrantless arrest of petitioners and seizure of the contraband before the trucks were moved to the open highway?

LIST OF ALL PARTIES TO THE PROCEEDINGS

There were seven defendants in the Louisiana courts. In petitioning this Honorable Court for the writ of certiorari, the parties have done so in two separate groups.

In No. 70-2045. the petitioners are Jeff H. Dupuis, Bernis H. Davison, John Zerbe, and Wilbur L. Smith.

In No. 79-1803, the petitioners are Jonathan Grassi, James R. Green, and Larry A. Cannon.

Respondent's brief herein is in response to both groups of petitioners - No. 79-1803 and No. 79-2045.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Respondent herein opposes petitioners' application for the writ of certiorari to review the judgment of the Supreme Court of Louisiana, entered December 13, 1979, rehearing denied January 28, 1980, declining to overrule a decision of the trial court which denied petitioners' motion to suppress certain evidence.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Louisiana in ***State of Louisiana v. Dupuis, et al*** is reported at 378 So.2d 934 (La. 1979). a copy of which is already attached to petitioners' brief in Appendix B.

JURISDICITON

The jurisdictional aspects of this matter are accurately set forth in petitioners' brief, and will not be repeated here.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this matter are satisfactorily set forth in petitioners' brief.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is generally accurate except that it overlooks three very important facts that are in the record:

1) The transferring of the marijuana from the larger trucks to the smaller trucks was observed by the officers in the ad-

joining cane fields not only by means of night vision devices, but also by means of the unaided eye (Tr. 470-478, 568-572)

2) Although the Dupuis family did in fact have fee title to the cane fields in which the officers were concealed, that property had been leased to an unnamed third party, leaving the Dupuis family with only a reversionary interest in the property (Tr. 519, 524, 525, 538, 539). Petitioners' brief repeatedly and misleadingly refers to the cane fields as "the Dupuis property."

3) The geographical location of petitioners' fenced curtilage vis-a-vis the roadway, the adjoining cane fields, and the adjacent highways, being of critical importance in evaluating the petitioners' "reasonable expectation of privacy", respondent is including as part of his Appendix herein, copies of photographs introduced by petitioners into evidence at the suppression hearing in order that this Honorable Court might understand the situs of the dispute. (D - 6, 8, 9, 10).

QUESTIONS PRESENTED

I.

Did the lower courts err in holding that petitioners had no reasonable expectation of privacy regarding their nighttime maneuvers of three trucks parked on an open roadway outside of the fence surrounding petitioners' curtilage but adjoining an unfenced open sugar cane field under lease to a third party and from which unfenced cane field narcotics agents were monitoring the movements of the suspect trucks for the purpose of following said trucks to a suspected marijuana transfer point elsewhere, and during which maneuvers petitioners carelessly illuminated the contents of the trucks so that the watching agents unexpectedly observed, with the naked eye, the presence of many large bales of marijuana already loaded in

the trucks?

II.

Did the lower courts err in holding that the narcotics agents monitoring the movements of petitioners' three trucks, with the expectation that the trucks were about to move on to an unknown marijuana pickup point, having suddenly and unexpectedly observed with the naked eye large numbers of bales of what the agents recognized as marijuana being transferred from a large truck to the two smaller trucks, the narcotics agents had probable cause and sufficient exigent circumstances to authorize immediate warrantless arrest of petitioners and seizure of the contraband before the trucks were moved to the open highway?

ARGUMENT

I.THE TELEPHONE SEARCH WARRANT

As was brought out at the hearing on the motion to suppress, the effort to obtain a telephone search warrant from a federal magistrate was botched by both Customs Officer Joachim and Magistrate Herbert. In fairness to both of these individuals, it must be remembered that neither of them had ever before attempted to carry out the newly-enacted procedures of Rule 41 (c) (2), F.R,Cr.P. (Tr. 299, 375). In fact, Joachim did not even have the necessary forms available at his end (Tr. 382), Herbert had received the call after midnight (Tr. 297), and Joachim was acting under the stress of considerable urgency (Tr. 406). It is small wonder that the warrant was invalid, but the fact that Joachim made the effort, despite Sergeant Trahan's reluctance to hold off the arrests while this was going on (Tr. 632), reflects Joachim's good faith.

In any event, at the hearing, the State conceded the invalidity of the warrant (Tr. 557, 558), and will not defend

it in this brief. It is submitted, however, that the abortive but good faith attempt to obtain a federal search warrant did not invalidate the ensuing arrests and seizures which were valid for reasons that having nothing to do with the federal search warrant. The invalid search warrant does not preclude reliance upon other grounds which support the legality of the officers' actions. *United States v. Jones*, 475 F.2d 723 (5th Cir. 1973), *cert. den.* 94 S. Ct. 96, 414 U.S. 841, 38 L. Ed 2d 77.

II. THE WARRANTLESS ARRESTS AND SEIZURE OF MARIJUANA

Any evaluation of the constitutionality *vel non* of the warrantless seizure of the 467 bales of marijuana requires the application of a number of basic legal principles to the fast-developing factual situation which confronted the state troopers and customs officers on the scene. The circumstances to be considered in the light of applicable constitutional principles are those pertaining to:

1) The presence of the two officers stationed in the cane fields.

2) The warrantless arrest of the petitioners.

3) The warrantless seizure of the truckload of marijuana.

1. *The presence of the two officers in the cane fields.*

It must be borne in mind that the two officers in the cane field were there for the purpose of observing and reporting the movements of three large vehicles parked on the roadway adjoining the cane field (Tr. 432, 437-438, 566, 626). This roadway was outside of petitioners' fenced-in curtilage, and connected a parish road with an intersecting highway (Exs. D6, 8, 9; Tr. 441). There were no gates, signs, or other indi-

cations that it was a private road (Tr. 524). There was no attempt by petitioners to conceal the three trucks under surveillance. They were parked in full view of the nearby public highways as well as in full view of the cane field in which the officers had stationed themselves (Exs. D6, 8, 9, Tr. 580, 624).

The officers had selected the cane field as the point from which to conduct their surveillance for the obvious reason that their presence on the public roads would have alerted the suspects, thus defeating the whole purpose of the surveillance (Tr. 580). This purpose, it must be emphasized, was simply to observe and report the movement of the vehicles - - not to search for marijuana (Tr. 432, 437-438, 484). In fact, the officers did not expect that there would be any marijuana in the vehicles or on the premises (Tr. 384, 437-438, 484). It was anticipated that the vehicles would be leaving to pick up a large quantity of marijuana elsewhere. When this movement shoud begin, the officers in the cane field were to alert their fellow-officers by radio in order that the latter might follow the vehicles to their unknown loading point (Tr. 437-438). This factual situation is conceded by petitioners at page 44 of their brief before the Louisiana Supreme Court.

Apparently fee title to the cane field was in the Dupuis family, although the land was being farmed by another person, through some unspecified tenancy arrangement. There were no signs or fences enclosing the cane field or separating it from adjoining cane fields or prohibiting entry by outsiders (Tr. 519, 524, 525, 538, 539). The curtilage itself was separated from the roadway and adjoining fields by a hurricane fence (Tr. 507, 539).

In the light of these facts and circumstances, we turn now to the pertinent principles of law to determine whether the officers in the cane field violated any constitutional rights of petitioners simply by observing the three vehicles from that

vantage point.

Implicit in the overwhelming majority of the "open fields" cases has been the circumstance that the officers in those cases were guilty of "technical trespass" in that they were on another's property without permission. (cf. *State v. Fearn*, 345 So. 2d 468 (La. 1977), where the officers were on a neighbor's property with consent.) Yet the "open fields" doctrine first enunicated by Mr. Justice Holmes in *Hester v. United States*, 265 U.S. 57, 44 S. Ct. 445, 68 L.Ed 898 (1924), is still viable, and the courts have never permitted a "mere technical trespass" to "transform an otherwise reasonable investigation into an unreasonable search." *United States v. Johnson*, 561 F.2d 832, 841 (1971) (USCA D.C.)

> "We agree with the *Gonzales (State v. Gonzales*, 388 F. 2d 145 (5th Cir. 1968) court that common law property concepts are not particularly illuminative of Fourth Amendment problems; and we take the "technical trespass" terminology of the Seventh Circuit as reflecting the same point of view. ***The question always remains one of whether the police action was reasonable under all the circumstances.*** *" United States v. Johnson*, supra, footnote 10, p. 841, (emphasis added).

The United States Court of Appeals for the Fifth Circuit has held that when an officer, in the performance of his official duties, finds it reasonably necessary to enter upon private property, his conduct, even though technically a trespass, is justifiable.

> "Here the original tip plus the sighting from the air dictated a police investigation to determine whether stolen goods were being transported. Under the circumstances an entry onto the property for the purpose of making a general inquiry was justifiable." *United States v. Knight*, 451 F.2d 275, 278 (5th Cir.

1971); *cert. den.* 405 U.S. 965, 92 S. Ct. 1171, 31 L. Ed.2d 241 (1972) and cases cited therein.

It follows that even if the two officers' presence in the cane field were a technical trespass, such trespass in itself had no adverse impact upon the constitutional consequences of any ensuing seizure, or arrest. ***Atwell v. United States,*** 414 F.2d 136, 138 (5th Cir. 1964).

That the concept of "technical trespass" is not the touchstone, but rather that the courts will look to defendants' "reasonable expectation of privacy" was made clear in ***Katz v. United States,*** 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), the leading case on the "reasonable expectation of privacy" rule, wherein the Court said:

> "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."

The ***Katz*** decision was carefully analyzed by the Louisiana Supreme Court in ***State v. Nine*** 315 So. 2d 677 (La. 1975), where the Court reiterated that "it is defendant's right to privacy, not a specific place, which is protected by the Fourth Amendment." ***Nine,*** supra, at p. 671. A footnote in the ***Nine*** opinion, at p. 671, quoted Justice Harlan's concurring opinion in ***Katz*** to the effect that, to fall within the protection of the Fourth Amendment, a person's subjective expactation of privacy must be one that society is prepared to recognize as reasonable.

This same concept of the "objective reasonableness" of an expectation of privacy has been referred to repeatedly by appellate courts as a ***sine qua non*** of Fourth Amendment protection. In ***Rakas v. Illinois***, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978), Mr. Justice Rehnquist, writing for the majority, said:

> "Obviously, however, a "legitimate" expectation of privacy by definition means more than a subjective expectation of not being discovered. A burglar plying his trade in a summer cabin during the off-season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as "legitimate." His presence . . . is "wrongful"; his expectation is not "one that society is prepared to recognize as "reasonable".

In determing whether "the law recognizes a subjective expectation of privacy as legitimate", the United States Court of Appeals for the Fifth Circuit has frequently relied upon the concepts of "open fields", *Hester v. U.S.*, supra, and "curtilage". In *U.S. v. Williams*, 581 F.2d 451, 453 (5th Cir. 1978), the Court said:

> "Although the expectations test has done away with outmoded property concepts no longer satisfactory for fourth amendment analysis . . . the distinction between open fields and curtilage is still helpful in determining the existence or not of reasonable privacy expectations . . . We have held that open fields surrounding a house are not protected under the fourth amendment and that a search of them need not be accompanied by a warrant issued upon probable cause".

The Court then held that "the outer limits of the curtilage are defined by the walls of the remote outbuildings. Certainly such buildings give an added expectation of privacy for their contents, ***but we see none as to the area outside and beyond them.***" (emphasis added) *Williams*, supra, at 454. The Court went on to say:

> "Because the agents in this case did not intrude upon the curtilage so defined, but merely detected the odor of mash while standing outside the curtilage,

> their furtive trespass, though carried to the very verge of propriety, does not render the search warrant invalid" (at p. 454.)

See also *Fixel v. Wainwright*, 492 F.2d 480 (5th Cir. 1974) where the Fifth Circuit Court of Appeals declared (at p. 483):

> "In defining the surrounding area entitled to such protection, the courts historically have found helpful the common law concept of curtilage, meaning "yard, courtyard or other piece of ground included ***within the fence surrounding a dwelling house.***" (emphasis added)

In *Nine*, supra, the Louisiana Supreme Court quoted with approval from *United States v. Fisch*, 474 F.2d 1071, *cert. den.* 412 U.S. 921, 93 S. Ct. 2742, 37 L. Ed. 2d 148 (1973) as follows:

> "The test applied as to society's tolerance of the search rests, as it has for years, upon 'the facts and circumstances - - the total atmosphere of the case'. There is no ready formula, 'each case is to be decided upon its own facts and circumstances.' What we undertake, actually, is a balancing process, a weighing of the social factors involved. Or, as Judge Duniway put it in the pre-Katz case of *Smayda v. United States*, 352 F.2d 251, (9th Cir. 1965), *cert. den.* 382 U.S. 981, 86 S. Ct. 555, 15 L. Ed. 2d 471 (1966), 'The public interest in its privacy, we think, must to that extent, be subordinated to the public interest in law enforcement,' " (315 So. 2d 667 at 671).

As in *Nine*, supra, the initial question here is whether the entry of the officers into the adjoining open fields violated

petitioners' justifiable expectation of privacy (see footnote 2 at 315 So. 2d 671). ***State v. Byers***, 359 So. 2d 84, 86 (La. 1978). Applying that yardstick as defined above to the facts at hand compels the conclusion that the petitioners herein had no ligitimate and reasonable expectation of privacy, ***especially insofar as an exterior surveillance of the three trucks was concerned.*** See ***U.S. v. Grimes***, 426 F.2d 706, 708 (5th Cir. 1970) where the Court upheld the legality of an agent's actions in observing the loading of untaxed liquor into an automobile, while the agent was in a field belonging to another, and the observations were by means of binoculars from a distance of about fifty yards.

In the case under consideration, the three trucks were parked on an open shell roadway which connected two public highways. This roadway, although privately owned, had no signs or gates barring public use, and there was nothing to distinquish it from a public road. ***The trucks were parked outside the hurricane fence that surrounded the Dupuis curtilage*** (tr. 507, 539), and they were easily visible from the public roads as well as from the open cane fields surrounding the curtilage. The petitioners, having "knowingly exposed" the trucks to public view, ***Katz v. United States***, supra, could not have had any reasonable expectation of privacy concerning an exterior view of the vehicles - - they simply didn't care, so long as the ***contents*** of those vehicles remained concealed.

The ground surveillance was undertaken as a result of intelligence information transmitted through normal criminal intelligence channels (Tr. 349-354, 623). This information was to the effect that specific persons, with possible prior marijuana trafficking connections, had assembled at the Dupuis residence, along with three large trucks having no apparent legitimate purpose. Although much of this information clearly was hearsay, it was reliable enough to raise suspicion and to form a reasonable basis for further investigation and to contribute to what later developed into probable cause for arrest. ***United***

States v. Matlock, 415 U.S. 164, 94 S. Ct. 998, 39 L. Ed. 2d 242 (1974), *United States v. Knight*, supra. The officers might have set up their nighttime observation of the three trucks from either the public roads (as they had been doing all afternoon in their moving surveillance) or the adjoining cane fields without violating anyone's reasonable expectation of privacy. They chose the cane field for security reasons only.

The instant situation is easily distinguishable from that in *State v. Byers*, supra, where the officers had trespassed onto private land, obviously barred to the public, for the sole purpose of searching for and seizing marijuana plants not otherwise visible. It is also different from *State v. Fearn*, 345 So. 2d 468 (La. 1977), where the officers entered an adjoining field with the consent of the owner for the specific purpose of viewing marijuana plants in defendant's field, the defendant having unsuccessfully attempted to conceal the plants from outside view, thereby attaining a reasonable expectation of privacy.

The present factual situation is more closely analagous to *Nine*, supra, in that :

> ". . . there was not any unreasonable intrusion into the area where the defendant had a reasonable expectation of privacy which society would consider reasonable under these circumstances; the side yard, while enclosed, was used as a passageway. It was not an area where the defendant had a reasonable expectation of privacy. . ." (315 So. 2d at 672)

As was held by the Louisiana Supreme Court in *State v. Wilbourn*, 364 So. 2d 995, 996 (La. 1978) *Cert. Den.*, 100 S. Ct. p. 46 (1979):

> ". . . the test is not only whether the person had an actual (subjective) expectation of privacy, but also

whether the defendant's expectation of privacy is of a type which society at large is prepared to recognize as being reasonable."

In *Wilbourn*, supra, the area in question was an open carport, easily accessible to visitors, delivery men, salesmen, and other members of the public, "including police officers on an investigatory mission". The Court concluded that this accessibility to outsiders must have been "reasonably within the contemplation of the accused". Likewise, the present petitioners must have contemplated the easy accessibility of their activities to public view. This is apparent from the measures taken to conceal the nature of the ***activities within the trucks*** while accepting the fact that the ***trucks themselves*** were open to public view from all sides. There was no reasonable expectation - subjective or objective - of privacy as to the exterior view of the trucks.

It is respectfully submitted that the officers' presence in the adjoining cane fields for the purpose of observing the movement and departure of the trucks on the roadway was not in violation of Fourth Amendment guarantees.

2. ***The warrantless arrest of appellants***

The evidence at the pre-trial hearing disclosed that, while the officers in the cane field were awaiting the departure of the three vehicles parked on the roadway outside petitioners' fenced-in curtilage, they observed a sudden spurt of activity in the area of the vehicles. The two smaller trucks were backed up flush with the back end of the large refrigerator van and sounds of loading activity were heard. Although the lights in the area had been extinguished (this was near midnight), and the trucks were being maneuvered without lights, the interior dome light from the cargo compartment of the smaller truck illuminated the interior of the large van as they were backed together and as they were separated. The officers in

the field, using binoculars and night-vision devices, as well as the naked eye, observed what they, from their experience and training, recognized as bales of marijuana (Tr. 470-478, 568 - 572). (NOTE: Petitioners' brief does not mention the fact that the bales of marijuana were seen by the unaided eye of one of the officers in the field.)

This totally unexpected development was reported to the command post by radio and, over Sergeant Trahan's objections, Customs Officer Joachim attempted to get the search warrant by telephone (Tr. 632).

As soon as the telephone call for the search warrant had been completed, Sergeant Trahan of the Louisiana State Police made plans for the immediate arrest of the persons on the roadway and seizure of the contraband in their possession. He ordered two of his subordinates, Troopers LeMaire and Theriot, to carry out the arrests, and this was done immediately upon receipt of Trahan's order to move in (Tr. 649, 669). Six persons were actually inside one of the trucks, surrounded by bales of marijuana, at the time of their arrest (Tr. 669, 671-672). The seventh suspect attempted to flee and was arrested by Trooper Theriot a short distance from the trucks (Tr. 649-650, 689).

The other officers moved in, the petitioners were taken into custody, and the 467 bales of marijuana in two of the trucks were seized (Tr. 674). Some of the officers later entered the curtilage to determine who else might be present in the area. This entry, however, occurred subsequent to the arrest of appellants and seizure of the marijuana and had no effect thereon.

From the foregoing recital it is clear that the surveillance team was confronted with a sudden and unexpected turn of events. Instead of observing and reporting the departure of the three trucks to a distant marijuana transfer point, the officers

suddenly realized that they were watching a felony in progress. There, in "plain view" was a group of individuals, already suspected of marijuana trafficking, surreptitiously transferring a large quantity of materials that, to these experienced narcotics officers, reasonably appeared to be bales of marijuana. At that point, the officers were not only authorized, they were duty-bound, to move in for the arrests and seizure of the contraband. Overlying the entire situation was a sense of urgency, for the trucks obviously were being prepared for movement.

Under Louisiana law, a peace officer may arrest without a warrant when the person to be arrested has committed an offense in his presence or when the officer has reasonable cause to believe that the person to be arrested has committed an offense, even though not in the peace officer's presence. Article 231, C.Cr.P.

What constitutes "probable cause" for the purpose of a warrantless arest has been exhaustively defined in *State v. Linkletter* 345 So. 2d 452, 455 (La. 1977), which includes the basic principles that :

> "Reasonable belief - - or 'probable cause' as it is termed under the federal standard - - to make an arrest without a warrant exists when the facts and circumstances within the arresting officer's knowledge, and of which he has reasonable trustworthy information, are sufficient in themselves to justify a man of average caution in the belief that a felony has been or is being committed." (citing cases)
>
> * * * *
>
> "And in determining compliance with these standards it is not the proof required for conviction which concerns us. Proof required to satisfy the requirement of reasonable belief or probable cause is less and is what

the terms imply; probabilities and practical considerations of everyday life on which reasonable men could reasonably be expected to act." (citing cases)

* * * *

"In such cases, because only factual issues are presented by the contentions, the setting in which the arrests took place becomes a factor of prime importance; facts and circumstances known to the arresting officers from which they might draw conclusions warranted by their training and experience become the focus of our attention with due allowance for the discretion vested in the trial court." (citing ceses)

The foregoing principles when applied to the facts at hand compel the conclusion that "the facts and circumstances known to the arresting officers" were such that "they might draw conclusions warranted by their training and experience" that would justify their "belief that a felony was being committed."

The facts, being crucial, although already related above are worthy of brief repetition. The officers had received information from their official criminal intelligence center concerning an assembly of persons at the Dupuis residence. Several of these persons had previously been the subjects of criminal investigation for narcotics trafficking. Upon the arrival of a strange vehicle at the Dupuis residence around midnight, the lights were extinguished. and the petitioners were seen to leave the fenced area and go out upon the roadway. Thereafter, the three trucks on the roadway were manuevered in total darkness. One of the three trucks was a large eighteen-wheeled refrigerated vehicle, of a type known to the experienced narcotics officers as frequently used for the shipment of marijuana (Tr. 626 - 627). Still in total darkness, the movement of materials from one truck to another could be heard by the officers. Then, through carelessness of the persons engaged in the off-

loading, the interior of the large van was accidently illuminated and its contents fully exposed to the view of the nearby officers. With the naked eye and regular binoculars, as well as with their nightvision equipment, the officers clearly saw stacks of large burlap bales. From their experience and training, these officers immediately recognized that they were viewing a great number of bales of marijuana. At that moment, what had been mere suspicion, bringing on the ground surveillance, ripened into "reasonable" or "probable" cause to arrest. That the officers could not yet smell marijuana or see the gleanings at that point does not negate the existence of probable cause based upon what they did see and hear. Proof beyond a reasonable doubt was not required for the ensuing arrests - - only "probabilities and practical considerations of everyday life." *Linkletter*, supra; *State v. Boyd*, 349 So. 2d 1256 (La. 1977).

In a case involving perhaps less probable cause for warrantless arrests and seizure of marijuana than exists here, the U. S. Court of Appeals for the Fifth Circuit declared:

> ". . . . The fair inference from the evidence was that the surveilling officers were experienced in apprehending those engaged in the drug traffic and that the sacks which were being unloaded were known to them to be of the type used in packaging marijuana." *U. S. v. Lopez-Ortiz*, 492 F.2d 109, 112 (5th Cir. 1974)

In *United States v. Worthington*, 544 F.2d 1275 (5th Cir. 1977) at p. 1277, the Court said:

> "Observation of the burlap sacks containing brick-shaped objects in plain view justified the arrest and subsequent search."

3. *The warrantless seizure of the marijuana*

a) *Incident to the arrests*

Once the validity of the warrantless arrests is established, there can be no difficulty with the seizure of the marijuana in which the arrestees were practically immersed. At the moment of arrest, six of the petitioners were in the smaller truck, with several bales of marijuana immediately behind them, and one bale at their feet (Tr. 672). The larger truck, now almost fully loaded (Ex. D-10), was right in front of them and less than two feet from the arresting officer's face (Tr. 684). Under those circumstances the officers had every right to seize the contraband.

La. R. S. 40:989 A (1) declares that all controlled dangerous substances which have been produced, manufactured, distributed or dispensed or acquired in violation of this part "shall be subject to forfeiture". La. R. S. 40:989 B (1) further provides that such substances may be seized without process when "the seizure is incident to an arrest with probable cause."

It follows that once the arrests with probable cause were accomplished, the marijuana could be seized as incident to those arrests.

In *United States v. Johnson,* supra, the Court, in a similar case, said:

> "When the police had seen a crime actually in progress with contraband in plain view, upon entry into the premises, they were fully authorized both to make arrests and to seek out the contraband." (at p. 841).

b) *"Plain view" seizure*

Assuming, for the purpose of this argument, that there has been no arrests as discussed above, the marijuana would still have been legally seized under the "plain view" doctrine. The two officers in the cane field were observing the trucks from a vantage point that did not intrude upon an area pro-

tected by the Fourth Amendment. Thus, they were "in a place where they had a right to be", at least within the constitutional concept of protected areas.

From their vantage point, the officers, because of petitioners' momentary carelessness, suddenly and inadvertently observed that which they did not expect to see - many bales of what they immidiately recognized as marijuana. It was obvious that the loading was almost complete and that time was of the essence - so much so that Sgt. Trahan argued against even trying to secure the telephone warrant. It was imperative that the officers should have acted before the trucks should get to the open highway with all of the dangers attendant upon seizure of a moving vehicle on a public road. Clearly, this was a "plain view" situation. *State v. Parker*, 355 So. 2d 900, 902 (La. 1978).

The abortive attempt to obtain the federal search warrant and the failure to attempt to obtain a state search warrant do not taint the legality of what actually occurred. As was said in *Cooper v. California*, 386 U.S. 58, 62, 87 S. Ct. 788, 791, 17 L. Ed 2d 730 (1967):

> "It is no answer to say that the police could have obtained a search warrant, for ' (t)he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable! *United States v. Rabinowitz*, 339 U.S. 56, 66, 70 S. Ct. 430, 435, 94 L. Ed. 653".

CONCLUSION

It is respectfully submitted that the courts below fully considered and correctly applied existing federal constitutional law to the facts of the case before them. There is nothing novel about the manner in which the lower courts applied the principles of *Katz v. United States*, supra. A careful reading of the Louisiana Supreme Court's decision in this case (found in Appendix B of petitioners' brief) discloses a marked recognition of the federal constitutional issues involved, and a careful and correct application of controlling constitutional cases. Accordingly, it is respectfully submitted that petitioners' application for the writ of certiorari in this matter should be denied.

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CERTIFICATE OF SERVICE

I certify that three copies of this brief have been served on petitioners named herein by depositing the same in the United States mail, first class postage prepaid, properly addressed to petitioners' counsel, Mr. Ferdinand J. Kleppner, of Grisbaum and Kleppner, 3224 North Turnbull Drive, Metairie, La. 70002 and Edward T. M. Garland, 1012 Candler Bldg., Atlanta, Ga. 30303, this 20th day of July, 1980.

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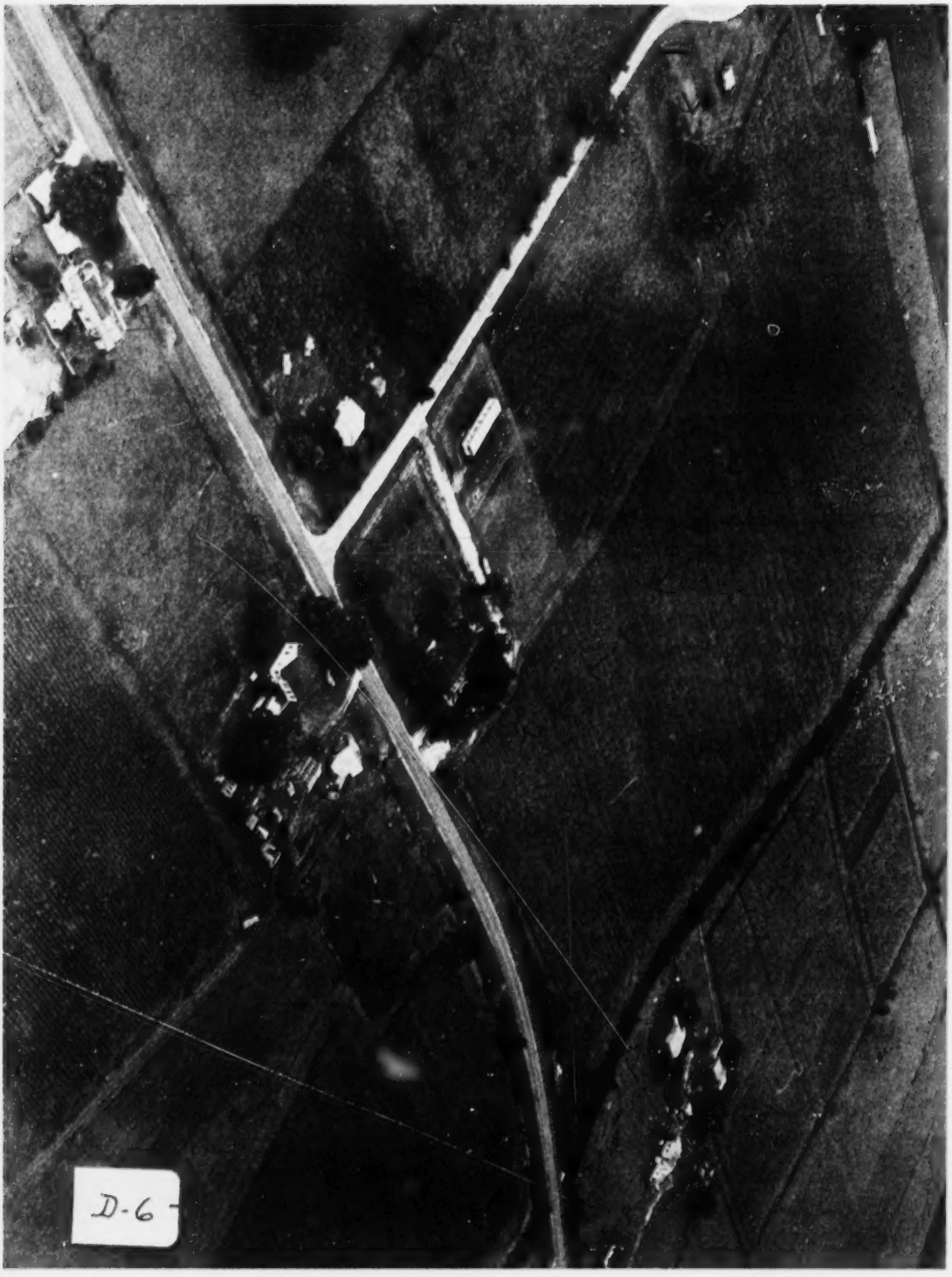
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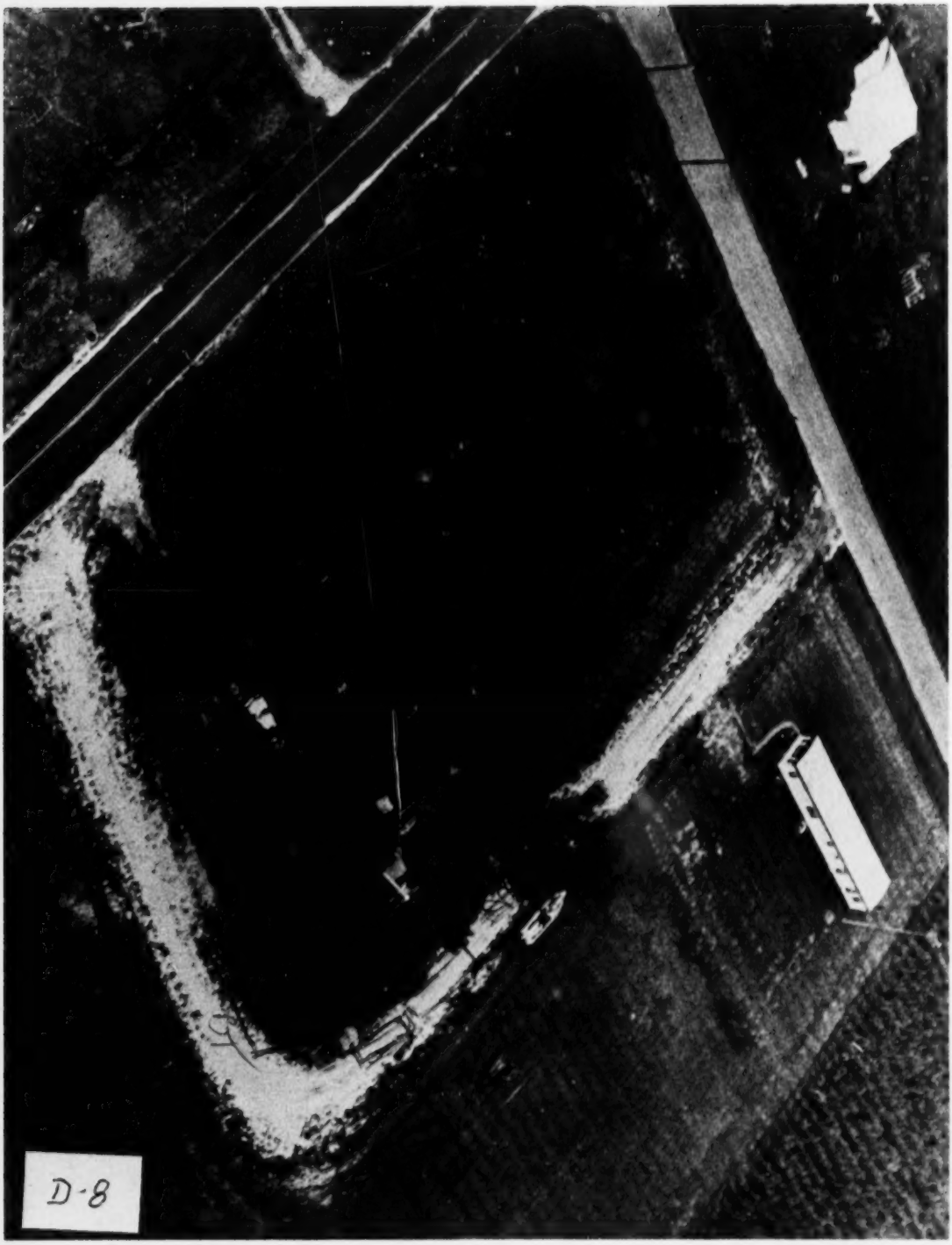
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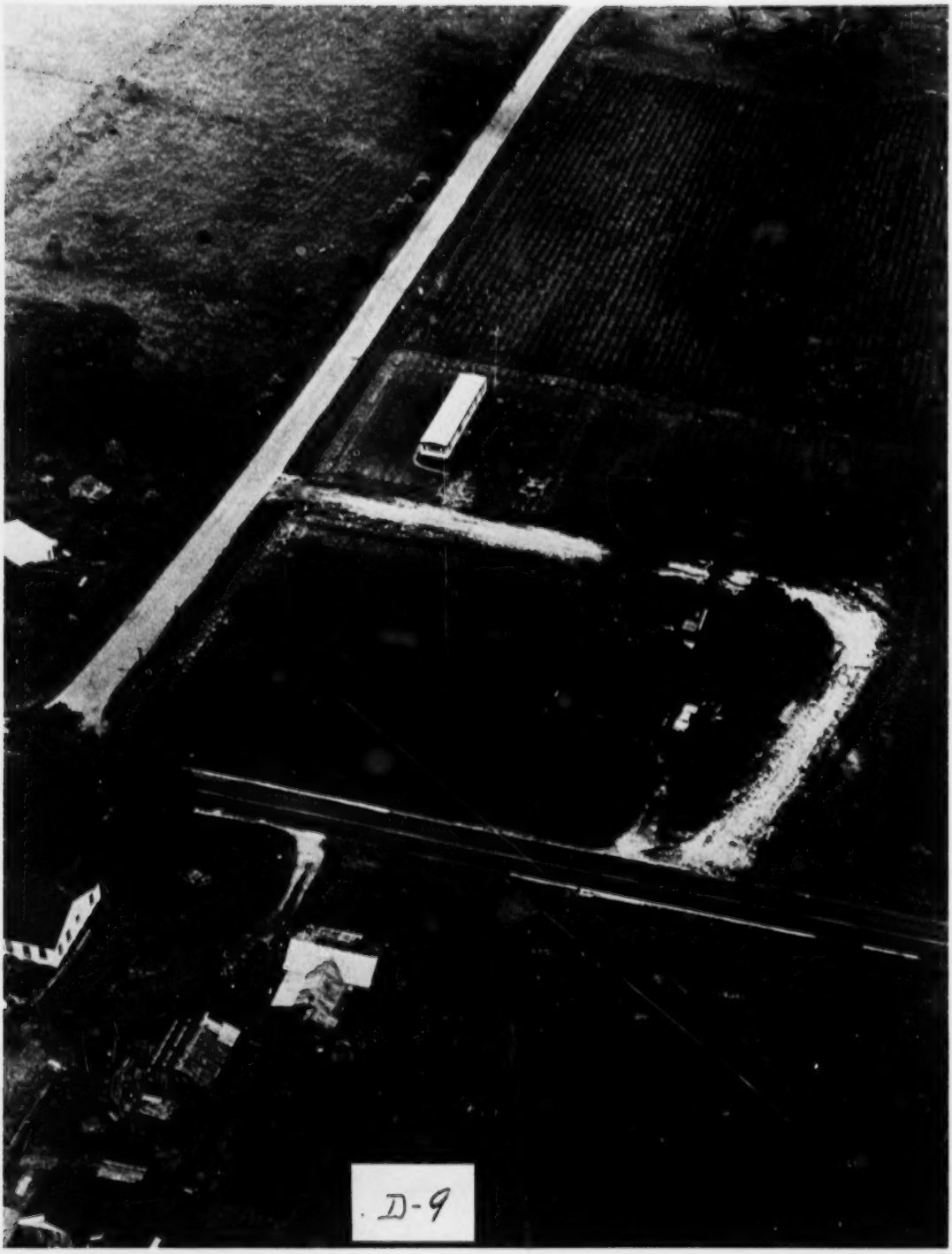
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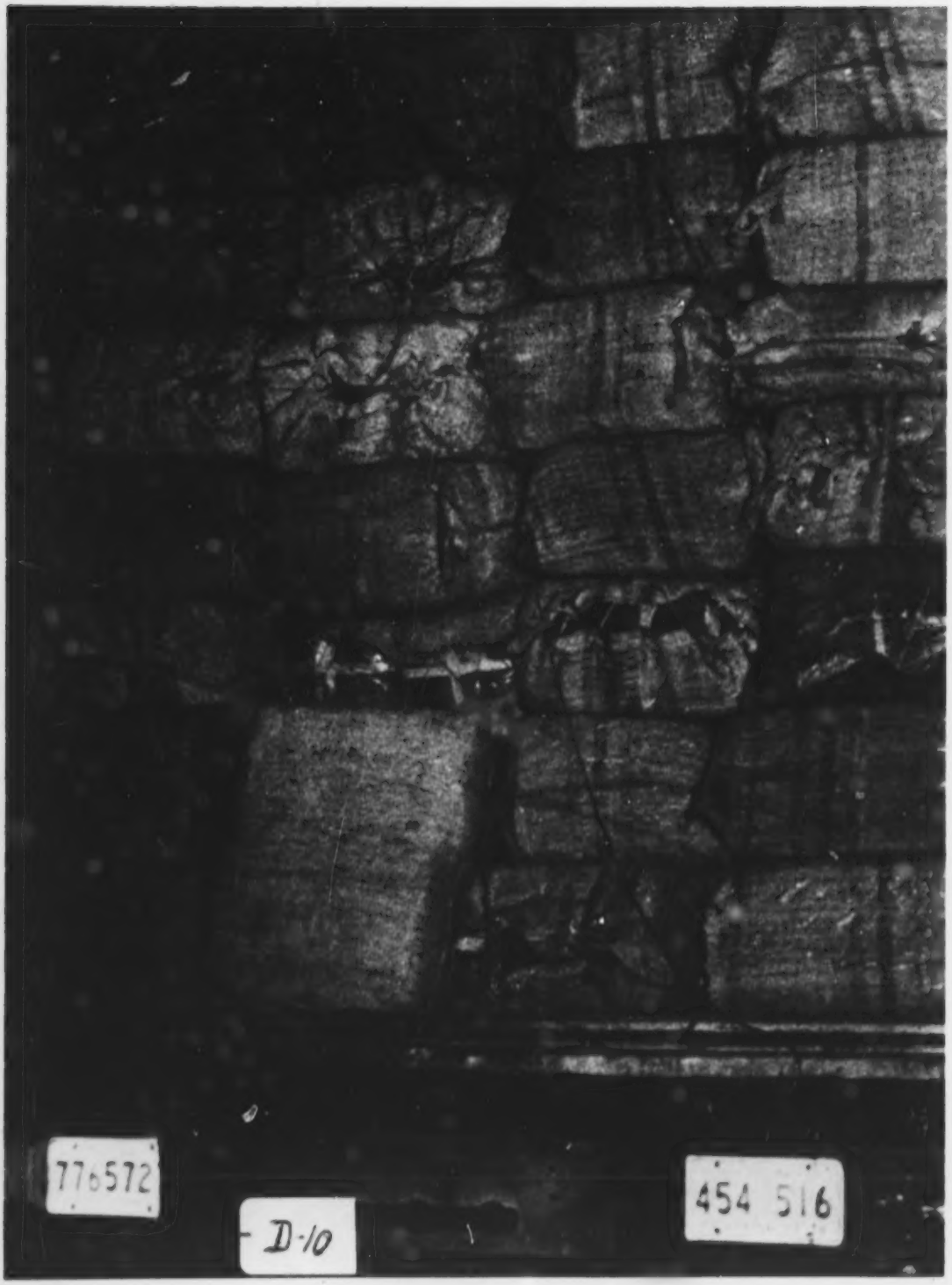
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